

REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q.C.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XXXI.

CONTAINING THE CASES DETERMINED
FROM HILARY TERM, 34 VICTORIA, TO MICHAELMAS TERM, 35 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :

ROWSELL & HUTCHISON.

1872.

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CHIEF JUSTICE

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ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

THE HONORABLE JOHN SANDFIELD MACDONALD
JUDGE OF THE COURT OF QUEEN'S BENCH
AND CHIEF JUSTICE

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J U D G E S

OF THE

C O U R T O F Q U E E N ' S B E N C H

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General :
THE HONORABLE JOHN SANDFIELD MACDONALD.

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REPORT OF CASES

IN THE

COURT OF QUEEN'S BENCH.

HILARY TERM, 34 VICTORIA, 1871.—(*Continued.*)

(*From February 6th, to February 18th, 1871.*)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

IN THE MATTER OF THOMAS H. MCKENZIE AND WILLIAM
MACKAY AND THE JUDGE OF THE COUNTY COURT OF
THE COUNTY OF BRANT.

Insolvency—Separate assignments by partners—Appeal from Assignee.

E., living at Brantford, and James and John G., living in Dundas, carried on business at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an official assignee in that county. On the following day E. made an assignment of his estate, under the Act, to an interim assignee in the County of Brant, and F. was afterwards appointed assignee by the creditors. K. & Co., creditors of E. & Co., filed a claim in Brant under E.'s assignment, which other creditors objected to, and the assignee, having heard the parties, made his award.

Held, that the County Judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal.

IN Michaelmas Term last, *Thomas Robertson* obtained a rule calling on the Judge of the County Court of the

County of Brant to shew cause why a writ of mandamus should not be issued directed to him, commanding him to hear and determine the merits of the appeal of the said applicants against the award of William Forrest Finlay, the assignee to the estate of Joseph Ellis and Company, insolvents, made by him under the Insolvent Act of 1869, in a matter in the said insolvent estate in which the said applicants were claimants and Lewis Kay and Company were contestants, on the ground that the hearing and determining of the merits of said appeal were within the jurisdiction of the said Judge, under the provisions of the Insolvent Act, and on grounds disclosed in affidavits and papers filed; and why such order should not be made as to the costs of the application and the proceedings thereon as to the Court might seem meet.

The affidavits shewed that the Judge refused to make any order in the matter of appeal from the award of the official assignee, on the ground that he had no jurisdiction.

Mr. Robertson, the attorney and professional adviser of the applicants, in his affidavit stated as follows:—That Joseph Ellis, of Brantford, in the County of Brant, and James B. Grafton and John S. Grafton, of Dundas, in the County of Wentworth, for some time previous to the making of the several assignments under the Insolvent Act of 1869, herein mentioned, carried on business at Brantford as woollen manufacturers, under the name of Joseph Ellis & Co.: that the principal books of account belonging to the said business were kept in Dundas by the two Graftons, in their store in which they carried on business on their own account, where the financial affairs of the business were chiefly managed, and where in part orders for the manufactured goods were received: that Joseph Ellis attended wholly to the manufacture of the goods at the mills in Brantford, and to supplying the orders for goods so manufactured: that James B. Grafton and John S. Grafton carried on a separate and distinct business as general dry goods merchants, also in Dundas, in which

Ellis had no interest whatever, under the name of J. B. & J. S. Grafton : that the whole of the assets of the estate of Joseph Ellis & Co. were situated in the County of Brant, and that Ellis resided and was domiciled in Brantford : that the Graftons resided and were domiciled in Dundas : that on the 15th December, 1869, Ellis executed a deed of assignment, under the Insolvent Act of 1869, of his estate and effects, to Augustus Wm. Smith, as interim assignee, he being an official assignee in the County of Brant, and that Wm. F. Findlay, of Hamilton, in the County of Wentworth, and an official assignee in Wentworth, was afterwards appointed and elected assignee at a meeting of the creditors of the estate; and thereupon the interim assignee executed a deed of transfer of the estate to the official assignee : that on the 14th of December, 1869, J. B. Grafton and J. S. Grafton, as individuals and as members of the firm of J. B. & J. S. Grafton, and as individual members of the firm of Joseph Ellis & Co., also executed a deed of assignment, under the Insolvent Act of 1869, of their and each of their estates and effects to the said Wm. F. Findlay, as interim assignee, who was afterwards duly appointed assignee to the last mentioned estates by the creditors thereof : that on the 8th of February, 1870, the applicants, being creditors of Joseph Ellis & Co., filed a statement of their claim against Joseph Ellis & Co., and verified the same : that on the 18th of April, 1870, Lewis Kay & Co., of Montreal, also creditors of Joseph Ellis & Co., gave notice in writing to the assignee and to the applicants, that they objected to the amount claimed by the applicants on the estate of Joseph Ellis & Co. : that on the day after the applicants answered the notice, verifying their claim by affidavit : that on the 7th of June following the assignee heard the parties and their witnesses, and made his award in writing, and deposited the same in the office of the Clerk of the County Court at Brant, and not in the County of Wentworth, and communicated the same to the applicants on the 28th of the same month of June : that on the

30th of the same month of June notice of appeal on behalf of the applicants was given to the assignee and to the attorney of Lewis Kay & Co.: that the time for hearing the appeal was enlarged from time to time by consent of parties and of the assignee, until the 27th of August, 1869, on which day Mr. Robertson for the applicants, and Mr. Davidson for Lewis Kay & Co., appeared before the Judge of the County Court of the County of Brant, being the Court in which the award was filed—the assignee also attending—and the said Judge heard the parties and fully examined the case, and then reserved his judgment until he should consider whether he had jurisdiction in the matter, inasmuch as the Graftons had not joined with Ellis in making the assignment: that on the 30th of October, 1870, the Clerk of the County Court of Brant wrote to the deponent that the Judge declined to make any order in the said matter: that Ellis has obtained his discharge from the Judge of the County Court of Brant, and the Graftons have obtained their discharge from the Judge of the County Court of Wentworth.

Affidavits were filed by the assignee and by J. B. Grafton, stating that the principal books of account of Joseph Ellis & Co. were not kept in Dundas but at Brantford.

During Michaelmas Term, *Harrison, Q.C.*, shewed cause for Lewis Kay & Co. Where several partners become insolvent, the separate assignment of each will not transfer the partnership estate: *Graham v. Mulcaster*, 4 Bing. 115; *Lowden's Settlement*, 10 L. T. N. S. 261; *In re Rowland and Crankshaw*, L. R. 1 Ch. App. 421; *Ex parte Maude*, *In re Braginton*, L. R. 2 Ch. App. 550; *Ex parte Carne*, *In re Whitford*, L. R. 3 Ch. App. 463. One partner cannot transfer the partnership estate and effects: *Story on Partnership*, sec. 101 and notes. If the Graftons conveyed all their partnership interest in the firm of Joseph Ellis & Co., Ellis's assignment has not passed their interest: *Cameron et al. v. Stevenson*, 12 C. P. 389; *Wilson v. Stevenson*, 12

Grant 239. Neither the Judge of the County of Brant nor the Judge of the County of Wentworth can act here, for the Statute contemplates only one assignment. If action can be taken at all, it should have been as two distinct and complete assignments made by the partners in the two counties, one for each county.

S. Richards, Q. C., and *Robertson* supported the rule. The assignments are each to the same assignee. An assignment by a person of all his property passes his partnership interest. The assignment by the Graftons of their interest in the firm of Ellis & Co. dissolved that partnership, so that Ellis had a separate and individual interest left, and that interest he did and could assign to the assignee. The Act of 1869, sec. 10, shews what property passes by the assignment. Where there are separate commissions in bankruptcy against the different partners, the partnership property passes under such commissions to the assignee: *Hancock et al. v. Haywood*, 3 T. R. 433. Sec. 82 gives an appeal to the Judge. By Sec. 142, *the Judge* means the Judge of the County Court in which county the proceedings are carried on. The proceedings carried on under that section must mean those that are and should be carried on at the place of business of the insolvent, and that in Ellis's case was in Brant; see also on this point secs. 2, 9, 11. The award was deposited under sec. 70 in Court—that means in the County Court of Brant. The Judge of Brant was the proper person to act in appeal. The assignment was made and filed there; the meeting of creditors and the appointment of the assignee were there; the place of business was there; the award was made and filed there, and all the proceedings have been carried on there. The discharge granted by the Judge of Brant bars all creditors. He must, therefore, have jurisdiction over the estate in all the proceedings connected with it.

WILSON, J., delivered the judgment of the Court.

The effect of the assignment by Joseph Ellis was to transfer to the interim and afterwards to the creditors' assignee all his estate and effects and his interest therein : secs. 10, 40, 43, 116—and to dissolve the partnership of Joseph Ellis & Co. : sec. 43—which agrees with the rule of law in such an event.

The assignment was made, as it must have been, to an official assignee as interim assignee, who was resident within the county or place wherein the insolvent had his domicile.

In the case of a partnership, "*the chief office or place of business* shall be the domicile or place of business" of the partners, "as the case may be, for the purposes of this Act : " Sec. 143. See also as to "*the place of business*" sec. 2 ; "*The chief place of business,*" secs. 25, 137.

Here the chief place of business of Joseph Ellis & Co. was at Brantford, and the domicile in fact of Joseph Ellis, the assigning partner, was there also.

On the 14th of December, 1869, J. B. Grafton and J. S. Grafton assigned all their estate "as individuals and as partners in the firm of J. B. and J. S. Grafton, and as individual members of the firm of Joseph Ellis & Co."

On the 15th of the same month, Joseph Ellis assigned his estate, without making any reference therein to his partnership estate.

All three partners composing the firm of Joseph Ellis & Co. went into insolvency.

Ellis's proceedings were conducted in the County of Brant, where he resided and had his chief place of business.

J. B. Grafton's and J. S. Grafton's proceedings were carried on in the County of Wentworth, where they resided, and where they carried on a partnership business between themselves, independently of their membership with Ellis in the partnership of Joseph Ellis & Co.

Mr. Findlay was the creditors' assignee for both estates under these two assignments.

The claimants filed their claim under Ellis's assignment at Brantford. It included the following item, among others: "1869, August 7, To wool, per invoice, \$2,278.78." For this sum the claimants held a note of the same date and for the same amount, made by J. B. and J. S. Grafton, payable to the claimants' order, at three months, as they said, as a security for that item against Joseph Ellis & Co. Lewis Kay & Co. disputed this item, on the ground that they (the claimants) had received the above note in payment of the same. The assignee decided against the claimants.

The Judge of the County Court says he has no authority to hear the appeal, because the Graftons, the copartners of Ellis, have not joined in the assignment with Ellis.

An individual partner may be insolvent, although the partnership to which he belongs is quite solvent.

The effect of his insolvency, by the express provisions of our Act, dissolves the partnership.

The claims against him individually and against him as a member of the partnership are provable against him. Those against him personally rank on his individual estate first; those against him in respect of the partnership rank on the partnership estate first. After all such claims have been so ranked, then individual debts may rank on the partnership estate and *vice versa*. The insolvent is entitled to be acquitted both as to his individual and as to his partnership debts.

If this item were a charge against Ellis alone, or were claimed as such, the Judge had plainly authority to hear the appeal. If, however, as the fact was, it was claimed as a charge against Joseph Ellis & Co., the claimants were still entitled to prove and to rank for it, firstly against Ellis's share and interest in the partnership estate, and secondly against Ellis's individual estate after all the creditors of that estate had been collocated.

No doubt the personal assignment of Ellis did not constitute the other partners insolvents, or transfer their shares or interest therein to the assignee.

The whole partnership estate was not therefore in adjudication in Brant. The interest of Ellis therein, however, was plainly in liquidation, and should have been so dealt with there.

That is sufficient to dispose of this case, for all that is asked for is a writ to oblige the Judge to hear the appeal from the award of the assignee; and we are clearly of opinion he has jurisdiction to hear and determine it.

The proceedings shew also that Ellis's two partners, at their domicile and chief place of business in Wentworth for their own matters—not, however, the chief place of business of Joseph Ellis & Co.—made an assignment in insolvency to the same person who was the assignee of the estate of Joseph Ellis & Co.

If the firm of Joseph Ellis & Co. had not been insolvent, but the shares of the partners therein had, by reason of the personal insolvency of one of them in Brant and of another of them in Wentworth, been as they would require to have been brought into account in the liquidation of the estate of the component members, the one assignment being in Wentworth and the other being in Brant would have been quite right.

But when that partnership is insolvent, and the two Graftons assign expressly on that ground their interest in the estate of that firm, it appears to me the assignment in respect of it should have been wholly carried on in Brant, because that county was unquestionably the chief or principal place of business of that firm.

All that can be said is, that the partnership of Joseph Ellis & Co. has not been put into insolvency yet, although the partners of it have been. Their separate partnership assets have been carried into account in the liquidation of their other estate, and in that way Ellis's share is being distributed in Brant and the shares of the two Graftons in Wentworth.

This irregular and imperfect proceeding does not affect the legal right of the claimants to have the Judge of the

County Court of Brant hear their appeal from the decision of the assignee, who has made his award against them on a matter for which they are entitled to rank firstly on the assets of Joseph Ellis in the partnership of Joseph Ellis & Co., and secondly on the individual estate of Ellis next after his individual creditors, if they can establish a just claim against the firm of Joseph Ellis & Co., which they say they can do.

The rule will be absolute for a mandamus to issue.

Rule absolute.

TRUMPOUR V. CRANDALL.

Money advanced upon grain—Right of action—Money lent.

The plaintiff, who was a warehouseman and dealer in grain, received in his warehouse from defendant between the 1st and 14th of October, 832 bushels of barley; and between the 15th September and the 2nd November had advanced to defendant \$242. Disputes having arisen, defendant sued the plaintiff for the value of the barley, and the plaintiff sued defendant in this action for the advance as money lent. In the first suit the now plaintiff pleaded the money paid, and received the benefit of it. The jury in this action found that the money was advanced upon the grain, not to be repaid until the sale of the grain to the plaintiff or some one else, and that there was no sale to the plaintiff. *Held*, that this finding entitled defendant to a verdict.

DECLARATION on the Common Counts. Pleas. 1. Never indebted; 2. Payment; 3. Set-off on Common Counts.

The cause was tried before Gwynne, J., at the last Spring Assizes at Picton.

It appeared that the plaintiff was a warehouseman and dealer in grain at Wellington, in the County of Prince Edward; and that between the 1st and 14th of October defendant had delivered in store, at the plaintiff's warehouse, about 832 bushels of barley. It further appeared that the plaintiff was in the habit of purchasing barley, when it was deposited in his warehouse. This barley was mixed with other barley belonging to the plaintiff and other persons deposited in the warehouse. The usual course seemed to be that the owners of the barley, when they

wanted pay for it, came to the plaintiff's office and fixed the price and received their pay. The plaintiff, on the 15th of September, had paid the defendant cash \$8.50, and on the 20th \$15, and between the 10th of October and 2nd of November sufficient further sums to make in all an advance of \$242.

There were different conversations between defendant and plaintiff about the price of the barley, defendant contending he was entitled to eighty cents a bushel, the plaintiff saying he was not, unless that was the market price. There was evidence of an understanding that the price was to be 75 cents a bushel and the rise during the week. The plaintiff contended he was only bound by this price if defendant came and asked for it during the week.

Much of the evidence went to shew that it was conceded between the parties that the plaintiff was to have the barley, and the only difficulty was in settling the price, and the money was advanced, the plaintiff having got the barley when most of it was paid, and expecting to get it when the first was advanced.

The defendant and plaintiff failing to agree as to the price, defendant sued him for the value of the 832 bushels of barley, and the plaintiff sued defendant for the money paid. Defendant, in this action, pleaded a set-off of the barley sold. Plaintiff, in the action against him, pleaded this money paid as a set-off.

At the close of the plaintiff's case the defendant's counsel contended there was no evidence of money lent: that the evidence on behalf of the plaintiff shewed that the advances were made on account of grain, in expectation of being paid when the grain should be sold either to the plaintiff or a third person; and that the evidence of what took place on the 25th October (when the agreement of 75 cents, or the rise of the market that week, was made) shewed a sale made to the plaintiff, the only question being whether there was any rise above 75 cents.

The learned Judge was of opinion that the legal con-

struction to put on the agreement of the 25th October was, that the defendant had a right to hold the plaintiff to 75 cents a bushel, unless there should be a rise within the week; in which event defendant was entitled to the rise. He nevertheless said he would leave it to the jury, giving the defendant leave to move to enter a non-suit.

He left to the jury two questions :

1. Were the moneys advanced by the plaintiff to defendant advanced by way of loan, or as an advance upon grain, to be repaid on the sale of the grain, if it should not be sold to the plaintiff, and if sold to the plaintiff to be accounted for in the price of the grain ; if the latter, he directed them to find for defendant.

2. Was the transaction of the 25th of October, spoken of by the plaintiff and his clerk, a sale by defendant at 75 cents, or at such higher price, if any, as barley should reach within the week.

On hearing the opinion of the learned Judge, defendant's counsel declined calling witnesses.

The defendant's counsel withdrew the plea of set-off before the plaintiff's case was closed.

The jury, in answer to the questions, said : 1. That the advance was on the grain, not to be repaid until the sale of the grain ; and, in answer to the second, that there was no sale on the 25th of October, as defendant did not come back within the week to say he would accept the price.

On this finding, the verdict was by agreement entered for the plaintiff with \$250 damages, with leave to defendant to move to enter a verdict for him upon the finding of the jury on the first question.

C. S. Patterson obtained a rule *nisi* to set aside the verdict, and enter a verdict for defendant, pursuant to leave reserved at the trial, on the ground that the finding of the jury amounted to a verdict for the defendant; or why a new trial should not be had, the verdict being contrary to law and evidence and

the Judge's charge, in this, that the evidence shewed that the money was paid on account of grain and was not recoverable in this action.

The rule was enlarged to Michaelmas Term, when *Wallbridge*, Q. C., shewed cause. The plaintiff having received the benefit of the amount claimed in this suit under a plea of set-off in another action between the said parties, of course the only matter in this suit now is the costs. The advances of money by the plaintiff to the defendant began on the 15th September, and the grain was delivered between the 10th and 14th October. The alleged sale to the plaintiff did not take place until the 25th of October, so the payments could not have been made on account of a purchase.

Jellett, contra. The defendant at the trial called no witnesses, as the learned Judge substantially ruled in his favor. The finding of the jury, however, was to the effect that the money was advanced not to be repaid until the grain was sold either to the plaintiff or some one else, and if to the plaintiff it was part of the purchase money. This finding entitled the defendant to a verdict, for there was in fact no money lent, and the grain was not sold, unless to the plaintiff.

RICHARDS, C. J., delivered the judgment of the Court.

We think the finding of the jury fatal to the plaintiff's case, and it was of no consequence whether the grain was sold to the plaintiff on the 25th of October or not. If, as the jury found, the money was advanced on a special agreement, not to be paid until the sale of the grain, if sold to any one else, the plaintiff cannot recover under this declaration, it appearing the grain was not sold to any one unless to the plaintiff. The plaintiff's counsel tells us on the argument that defendant recovered from the plaintiff for the purchase of the grain in the other action, and he has been allowed this sum against the plaintiff's claim. We should not, under such circumstances, grant a new trial,

unless under very clear circumstances. We understand the finding according to the first question put to them by the learned Judge and their answer, that the money was not advanced by way of loan, but as an advance on the grain, to be repaid if sold to any one else, or deducted from the price of purchase by the plaintiff. The finding of the jury in the other case, which has not been moved against, shews that the plaintiff was the purchaser, whether on the 25th of October or not, and has had these advances deducted from the price of the grain.

Under the leave reserved at the trial, the rule will be absolute to enter a verdict for the defendant.

Rule absolute.

WILLIAM ORR V. SAMUEL ORR.

Ejectment—Statute of Limitations.

In ejectment, it appeared that the mother of defendant, owning the land, lived upon it until her death in 1854. The defendant, who was the eldest son, and four other children, then lived with her, and there were four others, making nine, entitled to inherit. In 1858 the defendant conveyed one-ninth to his brother-in-law, who conveyed to the plaintiff, and the plaintiff's title to this was admitted; but defendant claimed the remaining eight-ninths by possession. He swore that when he came of age, in 1846, his mother verbally gave him the land, and promised to deed it to him, and that he had been assessed for it ever since; but she had lived on it with him until her death, which was within twenty years.

Held, that defendant had no possession as against the mother during her life, and that he therefore must fail.

EJECTMENT for the south half of the east half of lot No. 4, in the second concession of the Township of Sidney, in the County of Hastings, containing fifty acres. The action was commenced on the 3rd March, 1870.

The plaintiff, in his notice of title, by leave of a Judge, claimed title in himself to one-ninth of the land in the writ mentioned, as one of the heirs of Catharine Orr, deceased, who died seized of the land mentioned in the

writ, and to other five-ninths thereof by deeds for one-ninth from Tobias Blecker to the plaintiff, which said Tobias Blecker held the same by deed from the defendant; by deed from Jane Ann Lott, Sylvester Fanning and Eliza his wife, George Tucker and Caroline his wife, by deed from Tobias Blecker Orr, for one-ninth each, to the plaintiff.

The defendant, in his notice, admitted the making of the deed from himself to Tobias Blecker, and that by virtue thereof he was legally entitled to one undivided ninth part of the property mentioned in the writ, but he denied any actual ouster of the plaintiff from the property; and as to the remaining eight equal undivided ninth parts thereof, defendant claimed title in himself by length of possession.

The trial took place at the last Spring Assizes at Belleville, before Gwynne, J.

Catharine Orr, the mother of both plaintiff and defendant, was the owner in fee of the east half of lot 4 in the second concession of Sidney, and resided on the lot until her death, which took place in 1854 or 1855. Five of her children were on the place at the time of her death, namely, Caroline Tucker, Mary Anne Gordon, Samuel Orr (defendant), Tobias Blecker Orr, and Wesley Orr. It appeared on the trial that there were nine children of Mrs. Orr at her death, who would inherit this lot as co-heirs and heiresses.

The plaintiff, it was shewn, possessed in his own right, and by assignment from defendant and the other co-heiresses and their husbands, an undivided five-ninths of the whole. The plaintiff's right to an undivided one-ninth under the conveyance from the defendant, dated 1858, to Tobias Blecker, and by him to the plaintiff, by deed dated 22nd November, 1865, was admitted. His right to the remainder was disputed.

The defendant, on being called, stated that he was 46 years old; that his mother, by word of mouth, gave

him the south half of the east half, the land in question, and said she would deed it to him. This was in 1846, the first year he came of age. She was assessed up to that time, and he since. He helped to keep his brothers in clothes while his mother lived. His mother lived on his credit.

The defendant's counsel claimed to assert adverse possession in eight-ninths, commencing to run in the mother's life-time. The learned Judge thought otherwise: that the mother died seized in law, and adverse possession could only begin to run after her death; and he directed a verdict for the plaintiff, giving defendant leave to move.

In Easter Term last, *Jellett* obtained a rule *nisi* for a new trial—1. On the ground of rejection of evidence by the learned Judge to shew that the defendant had a twenty years' uninterrupted possession of the premises, commencing before his mother's death.

2. For misdirection, in telling the jury that the defendant could not have possession anterior to his mother's death; and

3. For telling the jury that a conveyance by deed of a one-ninth interest estopped him from claiming a larger interest.

During Michaelmas Term, *Wallbridge*, Q. C., shewed cause. The plaintiff must succeed as to an undivided one-ninth. It is admitted the plaintiff made out a good paper title to the whole undivided five-ninths. The land was owned by the mother, and she died within twenty years, residing on it. The parol agreement to convey to the defendant was never carried out, and there was nothing done to shew visible change of possession, or any distinct possession on defendant's part: *Foster v. Emerson*, 5 Grant 135; *McArthur v. McArthur*, 14 U. C. R. 544.

Jellett, contra. The evidence shewed the defendant in possession, and that he was assessed for the land. At the time defendant conveyed the one-ninth to Bleecker, his

possessory title had not ripened, but the conveyance would operate as an equitable title, and the defendant does not, in his notice, dispute the plaintiff's right to recover that undivided ninth part. *Doe Quinsey v. Caniffe*, 5 U. C. R. 602, shews that when the son was in possession during the father's lifetime for more than twenty years, the possessory title was good, though the father had exercised acts of ownership over portions of the property.

RICHARDS, C. J., delivered the judgment of the Court.

As to the undivided one-ninth which is claimed under defendant's own deed, the plaintiff must recover. There was evidence that defendant refused to give possession to the plaintiff, and nothing to shew he was willing he should hold the undivided one-ninth, and it was not asked to be left to the jury to say if there was eviction as to that.

The learned Judge expressed an opinion that the defendant having assumed to convey, in September, 1858, the undivided one-ninth of the land as one of the heirs-at-law of his mother, it was inconsistent for him to assert an adverse possession in eight-ninths commenced in the lifetime of the mother, and before the title by descent accrued in virtue of which the one-ninth was conveyed.

On this point it is of no practical consequence whether the views expressed by the learned Judge were correct or not, for according to the defendant's own statement his mother lived on the land up to the time of her death, and we are of opinion that the facts fail to shew that she was ever disseized of the land.

It cannot be properly said that defendant's mother was ever out of possession of the land at any time before her death, whilst she was actually living upon it. In *Reading v. Royston*, Salk. 423, it is laid down that "the Statute of Limitations never runs against a man but when he is actually ousted or disseized, * * * and where two men are in possession, the law will adjudge it in him that hath the right." It is true that case was decided long before

our Real Property Act of 4 Wm. IV., ch. 1, was passed, yet when both parties are in actual possession by living on the land the statute cannot run against the owner.

The views expressed in argument and by the Judges, in *Stephen v. Simpson*, 12 Grant 493, S. C. in Appeal, 15 Grant 594, seem to accord with the doctrine laid down in the case in *Salkeld*.

The observations of Sir John Robinson, in *McArthur v. McArthur*, 14 U. C. R. 545, might well apply here, where four or five of the children were brought up on the farm with the mother, and the oldest son (the defendant) had the management of affairs. In that case the learned Chief Justice said, "It signified nothing that the mother was for seven years incapable from age of taking the active management of the farm, and that her son Peter may have chiefly managed it for her. If the law were so absurd as to look upon a son so situated as in possession to the exclusion of his mother, it would be necessary for the widow to turn all her sons and daughters out of the house."

We are all of opinion the defendant has failed to shew that his mother was disseized up to the time of her death; and as the action is brought before the expiration of twenty years from the death of the mother, the plaintiff's right is established to recover for the undivided five-ninths of the land mentioned in the writ. [See *Thomas v. Thomas*, 2 K. & Johns. 79, 1 Jur. N. S. 1160.]

Rule discharged.

HARTY V. GOODERHAM ET AL.

Sale of goods—Contract by letters and telegrams.

The plaintiff, on the 14th June, by telegraph, asked defendants their prices for high-wines and whiskey. On the 16th defendants wrote, specifying the prices for quantities not less than a car-load, and requesting an order, which they said should receive prompt attention. On the 17th, the plaintiff telegraphed, "Send three car-loads high-wines." Defendants answered, that the price had advanced, and refused to deliver at the price first named. It was admitted that the order was reasonable in point of quantity, and that defendants had the goods on hand.

Held, that there was a complete contract, and that defendants were liable for not delivering.

DECLARATION—First count.—That defendants bargained and sold to the plaintiff, who bought from defendants, three car-loads of high-wines, to wit 7,119 gallons, at the price of fifty-three cents per gallon, to be delivered by defendants to the plaintiff free on board the cars of the Grand Trunk Railway Company at Toronto, to be paid for by the plaintiff on delivery; and all conditions were fulfilled, &c., necessary to entitle the plaintiff to the delivery of the said high-wines, yet defendants did not deliver the same, whereby the plaintiff was deprived of profits, &c.

Second count, alleging the contract to be to buy not less than one car-load, to wit, 2,373 gallons, at the same price, and to be delivered in the same way, at the plaintiff's request; and, whilst the agreement was in force, the plaintiff purchased of the defendants, and requested the defendants to deliver to the plaintiff free on board the said cars at Toronto, as agreed upon, three car loads, to wit, 7,119 gallons of high-wines, at fifty-three cents, to be paid for by the plaintiff on delivery; *avermment* of performance of conditions precedent, &c., to entitle the plaintiff to the delivery of the high-wines, yet that defendants did not deliver the same to the plaintiff, whereby the plaintiff was deprived of great gains. &c.

Defendants pleaded to the whole declaration that they did not promise as alleged, on which issue was joined.

The cause was tried at the last Fall Assizes, before *Hagarty*, C. J. C. P., at Kingston.

The learned Chief Justice directed a verdict for the defendants, with leave to the plaintiff to move to enter a verdict for him for \$355.95, with a certificate for full costs, if the Court should think the plaintiff entitled to recover.

The alleged contract arose out of a correspondence between the plaintiff and defendants by letters and telegraphic messages. All the plaintiff's letters and messages were sent from Kingston, and defendants' from Toronto.

The first was from the plaintiff to defendants, dated 14th June, 1870: "We will thank you to let us know your lowest prices for 50 O. P. spirits, and also 25 O. P., and rye."

Defendants, on the 16th of June, answered by letter: "Replying to yours of the 14th inst., prices are as follows, F. O. B. cars here, cash, packages charged (in quantities not less than a car-load):—

Spirits, 50 O. P., 53c. per gall. in Bond	} Net here.
do. 25 U. P., 28½c.	
Old Rye, 25 U. P., 30½c.	

"Shall be happy to have an order from you, to which we will give prompt attention."

On the 17th June, plaintiff sent defendants a telegraphic message: "Send three (3) car-loads H. wines; one (1) at once, if possible."

On the 18th of June, defendants telegraphed the plaintiff: "Price advanced five (5) cents on fifty (50) over-proof."

"On the 18th of June, the plaintiff wrote defendants: "We have telegraphed you last night to send us three car-loads H. wines; one at once, if possible. We are in immediate want of one, as we have only two puncheons in the house. You will oblige us by pushing on one to us at once, and another, if possible, within ten days. The third we would like about the first week in July."

On the 20th of June, defendants telegraphed to plaintiff: "Letter received. Do you understand that our price is

five (5) cents higher than last." And the same day they wrote him : " Yours of 18th received, to which we replied by telegraph," (copied as above) " to which we have as yet no reply. We await instructions from you before shipping. We sent you the following message on the 18th inst.: ' Prices advanced five cents on fifty over-proof.' "

On the 20th of June, plaintiff wrote defendants : " Your telegram just to hand. In reply, we would inform you that we do not understand your price to be five cents higher, at all events for the three car-loads we have ordered from you. We wrote you on the 14th, asking your prices for fifty O. P. spirits, and also 25 U. P. and rye whiskey. In answer, you wrote us on the 16th (which we have received on the 17th), quoting fifty-three cents for fifty O. P., F. O. B. in Toronto. We telegraphed you the same day, ordering what we required, and we expect to get it. If you had telegraphed us on the 17th that your price was advanced, we would have to abide by it, and order what we have, paying you the extra five cents. As it is, however, we feel every confidence in the honour of the parties with whom we are dealing, and therefore know that they will not try to take an advantage in which, had the tables been turned the other way, we would have been the losers. We trust you will not cause us any further delay, but will forward our order at your earliest convenience."

On the 22nd of June, defendants replied to plaintiff's letter of the 20th, and said, " In giving quotations we do not bind ourselves to a sale, and it is only when we know the quantity wanted, and agree to deliver that quantity at a price, that we are bound to deliver or make a contract. This we never did with you, and we are not bound to give you one gallon. Suppose you had chosen to order thirty or sixty car-loads, instead of three, according to your doctrine we would be bound to deliver whatever you might order. The thing is simply absurd under the circumstances; but, without prejudice, we will give you

one car-load at the old prices, and will ship it as soon as you say what kind you want; that is, with the understanding that you are satisfied, and make no claim for any more, except at current rates. You will observe you never ordered more than one car from us at once till this time."

On the 23rd of June, the plaintiff acknowledges receipt of the defendants' letter of the 22nd, and in reply says, "that we are very much surprised to find that you are not inclined to give us the quantity of spirits we have ordered. In your favour of the 16th, which you will see if you look at the copy thereof, you have quoted us a price and requested an order from us, which would receive your prompt attention. Certainly we must say that it is not very prompt attention you are giving that which you have asked. With regard to our taking this time three car-loads, we would explain that we have sold one to arrive; the other two we bought basing our calculations that spirits would not be any lower during the summer season, when the distilleries were all undergoing repairs; and our past experience has shewn us that we have always had to pay from five to ten cents a gallon higher in or about the month of August than we had to pay earlier in the season. On this account we had ordered three car-loads from you this time. You will also observe that you can hardly judge as to what quantities we are in the habit of buying, as we have not been dealing with you long enough for you to form an estimate. In conclusion, we would say that we consider we are justly entitled to the quantity ordered, and expect you to send it. Your early answer will oblige."

On the 24th of June defendants answered by referring to their letter of the 22nd, and saying, "In that letter you have our views, and we see no reason for any change. We consider what we proposed to do was both liberal and honorable."

It was shewn on the trial that fifty O. P. and high-wines meant the same thing.

It was admitted that if the plaintiff was entitled to

recover, the damages were \$355 95, and that three car-loads was not an unreasonable order, and that defendants had as much on hand.

In Michaelmas Term, *Britton* obtained a rule *nisi* to set aside the verdict, and enter a verdict for the plaintiff for \$355 95, pursuant to leave reserved, on the ground that the contracts declared upon in the first and second count of the declaration were proved, or that the contract as alleged in one or other of the counts was proved; or for a new trial, on the ground of misdirection in the learned Chief Justice, in telling the jury that the contract as alleged was not proved.

During the same term *Lash* shewed cause. There was no completed agreement. *Thorne v. Barwick*, 16 C. P. 369, in which there was held to be a contract, would be in point; but there, after the plaintiff's letter ordering the goods, the defendant answered appointing a day for the plaintiff's agent to come and select them. This distinguishes it from the present case. The defendants only sent the plaintiff a circular containing a list of the prices of the articles they were manufacturing. They were not contemplating making a contract until an offer was received and accepted; the quantity was not agreed upon, and there was no acceptance in the terms of the offer: *McIntosh v. Brill*, 20 C. P. 426.

Britton, contra.—The plaintiff asks, in effect, "what will you sell spirits for?" The defendants in answer state the prices for not less than a car-load. Plaintiff replies, "I will take three car-loads." This is a complete agreement, and both parties are bound by it. If the plaintiff had not acted in good faith, and had ordered an unreasonable quantity, it might be said the whole transaction was fraudulent; but it is not denied that defendants had the quantity ordered, and that the order was a reasonable one: *Duncan v. Topham*, 8 C. B. 225; *Hale v. Rawson*, C. P., Feb. 1858, referred to in 4 U. C. L. J. 168; *Story on Sales*,

sec. 129, and the cases cited in the notes; *Chitty's Commercial Law*, 667; *Smith's Merc. L.* 597.

RICHARDS, C. J., delivered the judgment of the Court.

I had occasion to consider the question of contracts entered into by letters and telegraphic communications in *Thorne v. Barwick*, 16 C. P. 369. This case in some particulars is like that, but it appears to me, the facts make out a stronger case for the plaintiff than they did in *Thorne v. Barwick*.

The plaintiff's first letter is merely one of enquiry as to prices.

Defendants', of the 16th of June, gives the prices and terms, and says that the quantity is not to be less than a car-load. They then invite the plaintiff to give them an order. In other words, the defendants say, "We will sell it at these prices. Will you purchase from us, and let us know how much." Promptly, apparently as soon as he received this letter, the plaintiff sends a telegraphic despatch, saying he will take three car-loads of high-wines, to be sent at once if possible. The defendants do not take any exception to the offer that the quantity is unreasonable, that they must have time to supply it, or make any objection further than telegraphing that the price of the article has advanced five cents.

Was not the contract complete on the plaintiff's acceptance? Is not defendants' letter in fact an offer to the plaintiff to sell him any reasonable quantity he may want, but not less than one car-load, at fifty-three cents per gallon for fifty O. P., in bond, &c.? Plaintiff says, "I will take three car-loads." Surely this is a complete bargain; and defendants could have sued the plaintiff if he had refused to take that quantity of spirits at the rate named.

Referring to the reasoning and cases cited in *Thorne v. Barwick* as the ground of our judgment in this case, we are of opinion the rule should be absolute to enter the verdict for the plaintiff for \$355 95 cents.

Rule absolute.

FREDERICK E. FOSTER V. TAYLOR.

Action on note—Plea, discharge under foreign bankrupt law—Omission of plaintiff's debt from schedule.

To an action on a promissory note made in the United States, defendant pleaded his discharge under the bankrupt laws there; to which the plaintiff replied, that by such law the discharge was fraudulent and void, because the defendant, in the schedule attached to his petition, had fraudulently, and with intent to prevent the plaintiff from sharing in his estate or opposing his discharge, omitted any mention of the plaintiff or his claim.

The omission was proved, and the law of the U. S. was stated to be, that such omission, unless fraudulent and wilful, would not avoid the discharge; but it was not shewn whether the assent of a certain number of creditors or the payment of a certain dividend was requisite, or whether there was any provision which would shew a motive for the omission. The defendant swore that his reason for the omission was, because he thought the claim was paid: that in 1865 he had left property with one C. to sell and pay it, among other debts, and told defendant's brother, who then held the note, that he had done so; and that as late as 1868 he had seen him, and he never mentioned the subject, nor had he at any time been asked for the money. The brother, in answer, said he had asked for payment, but did not state the time.

Held, leave having been reserved to move for a nonsuit upon the whole case, that the rule should be absolute; for though upon the plaintiff's evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by defendant.

DECLARATION—First count, on a promissory note, dated 21st December, 1863, for \$300, made by defendant payable to one W. S. Foster, or order, one month after date, and by W. S. Foster endorsed to the plaintiff.

Second count, on a promissory note made by one A. P. Wildrich, on the 27th October, 1863, for \$100, payable to one W. S. Foster, or order, one day after date, by W. S. Foster endorsed to defendant, and by defendant to one W. S. Foster, who endorsed to the plaintiff.

The third count was struck out by order of the learned Judge at the trial,

Pleas—1. To first count: *Non fecit*.

2. To second count: Did not endorse.

3. To second count: Denying presentment.

4. To second count: Denying notice of non-payment.

5. To second count: that he endorsed the note for the accommodation of one W. S. Foster, and there never was any value or consideration for the endorsation of said note by defendant, and the same was endorsed to the plaintiff and plaintiff held it without any value or consideration.

9. To the whole declaration: that the causes of action in the declaration mentioned arose within the jurisdiction of the United States of America, and that before action the defendant became a bankrupt within the meaning of the statutes in force in the United States concerning bankruptcy, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt, and that the defendant having conformed to all the requirements of law in that behalf within the United States, was duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and by an order of the District Court of the District of Massachusetts, in the State of Massachusetts, one of the United States of America, the defendant was discharged from all debts and claims against his estates, including the several promissory notes mentioned in the declaration in this cause.

The plaintiff took issue on all defendant's pleas but the ninth.

And to the ninth plea he replied that defendant's bankruptcy was voluntary, and the application for adjudication, which resulted in the discharge of defendant mentioned in that plea, was made by petition of defendant, and according to the statutes and laws mentioned or referred to in the said plea in force in the United States of America, also mentioned and referred to in said plea, it was the duty of and incumbent on defendant, when he so made application by petition under said laws, to annex to his said petition a schedule, verified by oath before the Court or before a Register in Bankruptcy, or before one of the Commissioners of the Circuit Court of the said United States, containing, amongst other things, a full and true

statement of all the then debts of the defendant, and as far as possible to whom due, with the place of residence of each creditor, if known, and if not known the fact to be so stated in such schedule, and the sum due to each creditor of the defendant. And the plaintiff further says, that the defendant, in violation of the defendant's said duty and contrary to the said statutes or laws of the United States, wilfully, wrongfully, and fraudulently, and with intent to deprive the plaintiff of the right and opportunity of either ranking upon and sharing in the estate in bankruptcy of defendant, or of opposing his discharge, omitted to insert the name of the plaintiff in the said schedule, or to make any mention whatever therein of the claim by the plaintiff set forth in the declaration in this cause; by reason whereof the plaintiff had no notice of defendant's bankruptcy, and was therefore unable to prove his claim against the estate of defendant, or to oppose the granting of his discharge. And the plaintiff further says that, according to the said statutes or laws of the United States, the discharge of defendant is, by reason of the premises, fraudulent and void against the plaintiff.

The case was tried at the last spring assizes at London, before *Morrison, J.*

The notes declared on were assigned to the plaintiff by his brother, W. S. Foster, for some small consideration, and W. S. Foster was the witness at the trial who proved the defendant's signature to one of the notes and his endorsement of the others. He also gave evidence of presentment and notice of non-payment of the other notes. The evidence as to presentment and notice of non-payment did not seem satisfactory, but the note for \$300 was shewn to have been signed by defendant, and the principal contest at the trial was, whether the replication to the ninth plea had been made out.

The proceedings in insolvency were proved by copies under the seal of the Court in Massachusetts.

The name of the plaintiff was omitted in the schedule

of defendant's creditors attached to the petition, and no mention whatever was made therein of the claim of the plaintiff set forth in the declaration in this cause ; in fact, there was no reference in the schedule to the \$300 note or any of the others, or of indebtedness to any one on account of the same.

A professional gentleman residing in the United States was called, who proved the existence of the law of the foreign country establishing the courts of bankruptcy, and the seal of the particular court verifying the proceedings. He said, according to the law, if a creditor were omitted, the insolvent was not entitled to his discharge, and the debt was not discharged. On cross-examination, he said the fact of the omission by a bankrupt was *prima facie* evidence that it was done wilfully ; but, if it appeared that it was accidental or by mistake, or that the bankrupt used due diligence, the mere omission in that case was not fraudulent, and the bankrupt was discharged ; but if it were shewn otherwise he was not discharged, and the onus laid on the debtor to shew that the name was inserted, or that the omission was not wilful or fraudulent, and that he used due diligence to discover the party. Simple omission of a creditor's name, he said, was not sufficient to invalidate the bankrupt's discharge. The learned Judge noted that the witness eventually said that, unless the omission was wilful and fraudulent, the discharge was good.

The defendant's counsel contended that the replication to the ninth plea was not proved ; that the evidence failed to shew that the name or demand of the plaintiff was omitted in the schedule to the petition fraudulently.

The plaintiff's counsel contended that the bare omission of the name and debt from the schedule *prima facie* entitled the plaintiff to succeed. The learned Judge gave leave to the defendant to move to enter a verdict for him on the replication to the ninth plea, if the Court should think there was no evidence to go to the jury to sustain it.

The defendant was then called. He did not deny signing the \$300 note, but denied notice or presentment of the other notes. He explained that the reason why he did not put that note or the plaintiff's claim in or refer to it in the schedule was, because he thought it was paid : that when he left the army he left horses and other property with Major Comstock to sell and pay the \$300 note and some other debts out of the proceeds of the sale, and told Foster he had done so, and to get the pay from him : that he frequently saw Foster and his brother, the plaintiff, after that : that they never mentioned it was not paid, and he supposed always it was paid : that he saw the witness Foster in 1868, and he never mentioned the subject : he left the regiment in January, 1865 ; that Foster never asked him to pay the note, and he thought it was satisfied.

W. S. Foster, on being recalled, said that after the defendant left the service he asked him for the payment of the \$300 and the other notes.

The learned Judge left it to the jury on the several issues as to the \$300 note, as well as on the issue raised on the replication to the ninth plea. The jury, after being out some time, came into Court, and said they found for the plaintiff for \$300 in greenbacks, without interest, and each party to pay his own costs. The learned Judge declined to receive this verdict ; they returned to their room, and after some time came back with a verdict for the plaintiff, damages, \$150.

In Easter Term last, *Becher*, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the plaintiff's evidence at the trial and the defendant's objection thereto, or for a new trial on the law and evidence, and because the verdict was against evidence.

During Michaelmas Term last, *Ferguson* shewed cause. The fact was clearly shewn that the demand sued for was omitted from the schedule annexed to defendant's petition in bankruptcy. The effect of that omission was to prevent

the plaintiff from ranking on defendant's estate for his debt or from opposing his discharge, if inclined so to do. Now this being the effect of what defendant did, it would prejudice and injure the plaintiff and defraud him of a portion of his debt. It was evidence to go to the jury. Afterwards defendant explained the cause of his omission, and he was contradicted in his statement that Foster had not asked him for the note since he left the army; Foster, on being called, said he had done so. The matter was left to the jury, and they found for the plaintiff. The verdict ought not to be disturbed.

Becher, Q. C., contra. There was no evidence that the plaintiff's claim was fraudulently omitted in defendant's schedule, and the evidence of the professional gentleman called by the plaintiff himself at the conclusion was to the effect that the mere omission of the claim in the schedule was not evidence of a fraudulent intent. The defendant's ninth plea is attempted to be answered by the replication. The affirmative of the issue is on the plaintiff. The fraudulent omission of the name is a substantial part of the replication, which must be proved affirmatively, and no evidence was offered to prove it. There could be no fraudulent intent in omitting the claim, and there was nothing to shew any motive for so doing.

RICHARDS, C. J., delivered the judgment of the Court.

It is difficult to come to a satisfactory conclusion in this matter.

The defendant was undoubtedly required by the law under which his discharge was obtained to put into his schedule all claims against him, and when an established claim is omitted from the schedule, it seems only a reasonable conclusion that it is *primâ facie* evidence of being improperly left out. It would be an extremely harsh rule to hold that the mere omission of this claim in the schedule should invalidate the certificate or make the party liable to pay the debt when he had honestly surrendered all his estate.

We have very little information as to the provisions of the United States Bankruptcy Acts—whether they require that a certain number of creditors should assent to the discharge or not—whether the estate should pay a certain dividend—in fact whether there is anything in those Acts which would shew a motive for the omission of this debt in the schedule by the defendant.

As a general rule, it would seem unjust to assume a corrupt motive against a party for the omission of an act, unless it was shewn that some advantage would accrue to him by so doing. The following observations from the fourth edition of *Starkie* on Evidence, at p. 845–6, seem pertinent: “That a man will consult his own preservation, and serve his own interests; that he will prefer pleasure to pain, and gain to loss; that he will not commit a crime or any other act manifestly tending to endanger his person or property, without a motive; and conversely, that if he has done such an act he had a motive for doing it, are principles of action and of conduct so clear that they may be properly regarded as axioms in the theory of evidence.”

If the defendant believed that the notes sued on in this cause were really an existing claim against him, it would have been manifestly his interest to have placed them in the schedule, as there would not then, as I understand the provisions of the law, have been any doubt that he would have been discharged from the debt. He states in his evidence, that when he left the army he placed property in the hands of the major of the regiment to dispose of to pay all his liabilities, these amongst the rest, and he told the plaintiff's brother, who then held the notes, that he had done so. He further says, that he saw the plaintiff's brother as late as 1868, and he never told him the demand was not paid. The brother, on being recalled, did not deny that defendant had told him about the horses and other property having been left with the major to sell and pay the debt due to him amongst others, but he said he had asked defendant for the amount since he left the army.

He does not fix the time. It may have been at that very time that defendant told him of having put the property into the major's hands to pay the debt.

We think the reasonable conclusion to draw from the evidence is, that the omission to put the claim in the schedule was because he believed it had been paid, and therefore the jury ought to have found for the defendant on the replication to the ninth plea.

The way in which the verdict was at first rendered, and then the finding for \$150, serves to shew that the jury had not that clear conception of the matter that they ought to have had, or that the verdict was the result of a compromise that would not under the evidence be at all proper, for the verdict on the replication to the ninth plea should have been for the defendant, or, if for the plaintiff, the damages should have been, if only for the amount of the \$300 note, for a larger sum than \$150.

We think, therefore, the verdict should be set aside.

I do not see my way so clear in ordering a nonsuit, as asked for in the defendant's rule. He clearly and undeniably omitted to enter the claim in the schedule. The consequence was, neither the plaintiff nor the person from whom he obtained the claim was made aware of the pending proceedings in bankruptcy. The plaintiff could not prove on the estate nor oppose defendant's discharge, if he had desired to do so. Can I say that there is no evidence that a jury may be called on to consider, in the absence of any explanation, and say if this was done with a fraudulent intent or not?

The want of more evidence on the part of the plaintiff may be commented on. Why does not the plaintiff shew why the omission of the claim ought to be considered as fraudulent? It was voluntary. But what fraudulent intent could the defendant have had in omitting? What is there in the law itself that would make it of any practical use to defendant to have omitted the plaintiff's claim?

Considering the leave to enter a nonsuit to extend to the

whole case, which is the view the learned Judge takes of what occurred at the trial, then looking at the undisputed facts stated by defendant—that his reason for not putting the claim in the schedule was that he supposed it had been paid by the sale of the property he had left with Major Comstock for that purpose, and that as late as 1868 he saw the plaintiff's brother, the witness, and he said nothing about the claim—this repels even the slight ground that the claim was omitted from the schedule for an improper cause.

As my learned brothers take a strong view of the subject, I concur, and the rule to enter a nonsuit should be made absolute..

Rule absolute.

LOUCKS V. WALLBRIDGE.

Sale of share in mines—Agreement to account for half the profits—Construction of.

The plaintiff, having discovered mines upon certain lands, agreed with D. & T. that they should furnish the funds to work the mines, and, after securing the title, convey an undivided third to him. He afterwards agreed to assign his interest in this agreement to the defendant, in consideration of \$100, and one-half of whatever profit might be derived from the share agreed to be given to him by D. & T.; and the defendant agreed to account for and pay over to him one-half of whatever profits or returns might be derived from the said share assigned to defendant, as agreed to be given to the plaintiff by D. & T.; and further, it was agreed that the plaintiff should not have to pay or advance any moneys or labor in the working of said mines. The defendant having sold one-half of his interest to one G. for \$1,125.

Held, that this money was not profits or returns derived from defendant's share, for which he was bound to account to the plaintiff under his agreement.

THE declaration in this cause set out that the plaintiff, by deed, dated 26th October, 1863, made between him and the defendant—after reciting that, under a certain prior agreement under seal between the plaintiff, of the one part, and one Dean and one Thomson of the other part, the plaintiff had, on certain lands therein mentioned, discovered valu-

able mines, to which Dean and Thomson were to acquire title, and were to furnish funds to open the said mines, and convey to the plaintiff certain interests in the said mines and lands; and after reciting that the plaintiff had agreed to assign his interest in the said agreement to the defendant for a moneyed consideration, and a further consideration of one-half the profits that might be going to the plaintiff under said agreement,—did bargain, sell, assign, and set over to the defendant, and the defendant accepted the same, all the right and benefit of the plaintiff in and to the said in part recited agreement, and all his interest in the lands therein mentioned. And for that the defendant, by his deed to the plaintiff, dated 23rd November, 1863, covenanted to and with the plaintiff that he would account with the plaintiff, and pay over to him, one-half of whatever profits or returns he might derive from or under the said in part recited agreement made as aforesaid between the plaintiff and Dean and Thomson, and assigned as aforesaid by the plaintiff to defendant. Breach, that defendant, on the 8th February, 1868, by deed, sold to one Gilbert for \$1,125 one-half the interest in the said lands and mines which he so acquired from the plaintiff, and the said Gilbert then paid the said money to the defendant; and that such money was a portion of the returns and profits derived by defendant under the assignment made by the plaintiff to defendant; yet the defendant has not accounted to the plaintiff for one-half of said moneys, nor paid the same to him, although the same has been demanded, &c.

Count for money had and received, and for interest.

Pleas—1.—*Non est factum*. 2.—That the defendant has not derived from or under the said in part recited agreement any profits or returns whatever, as in the first count alleged. 3.—That the plaintiff never at any time before suit demanded from defendant the profits and returns, or any part thereof, as alleged. 4. Never indebted, to the money count.

The case was tried before Gwynne, J., at the last Picton assizes, without a jury.

At the trial an agreement under seal, dated 26th October, 1863, was put in, made between the plaintiff and defendant. It recited articles of agreement, dated 19th December, 1862, between the plaintiff, of the first part, and one Dean and one Thomson of the second part, by which, after reciting that the plaintiff had discovered valuable mines upon certain lands (setting out the lands), and that Dean and Thomson had agreed to secure the title to said lands, and to furnish the funds to open said mines in a prudent way, said Dean and Thomson agreed to secure the title, if practicable, and furnish the necessary capital to open the mines as soon as practicable, and, after the title was procured, to convey to the plaintiff or his heirs one equal undivided third part of said mines and lands, excepting a certain half lot (mentioned), all the lands mentioned in the deed to be entered in the name of Thomson for the benefit of all the parties. A similar agreement was then, by the agreement put in, entered into between the parties in regard to certain other lands supposed to be in a certain concession mentioned, but not then ascertained. It was then recited that the plaintiff had agreed to assign his interest in said recited agreement to defendant, in consideration of \$100, as also in consideration of one-half of whatever profit might be derived from the share so agreed to be given to the plaintiff by Dean and Thomson. The agreement then witnessed that the plaintiff, in pursuance of such agreement, and also in consideration of the \$100, bargained, sold, assigned, and set over unto the defendant, his heirs and assigns, all the right, benefit, and advantage of him, the plaintiff, of, in, and to said agreement, and all the right, title, and interest of the plaintiff of, in, and to the lands therein mentioned; and the plaintiff thereby authorized and required Dean and Thomson to give the deed for said land to defendant, and generally to act with defendant as if the plaintiff was personally present.

By a memorandum of agreement under seal, made on the 23rd November, 1863, between the plaintiff and defendant, the defendant, in pursuance of the above agreement, and in further consideration of five dollars, covenanted to and with the plaintiff that he, the defendant, would well and truly account for and pay over to the plaintiff "one-half of whatever profits or returns may be derived from the said share assigned to said Wallbridge, as agreed to be given to said Loucks by Dean and Thomson in and by the agreement made between them, and referred to in this memorandum; and further, that said Loucks shall not have to pay or advance any moneys or labor in the working of the said mines, or any of them."

It also appeared that, by an indenture made on the 8th of February, 1868, the defendant, in consideration of \$1,125, granted, bargained, and sold to one Gilbert, his heirs and assigns, one undivided half of his interest and estate in all the lands mentioned in the agreement made between the plaintiff and defendant of the 26th October, 1863 (setting them out), and one undivided half of all the interest of the defendant in, to, and out of the said agreement, and of the rights and interest accruing from the same.

Gilbert was called as a witness, and he stated that he purchased from the defendant his interest in the lands for one Yeoman, and paid the defendant \$1,100 in cash, and took the deed in his own name.

Upon this evidence and the deeds the plaintiff contended he was entitled to one-half of the \$1,100, the defendant submitting that the plaintiff was not entitled to any portion of it; that the meaning of the covenant between the plaintiff and defendant was, that the plaintiff was to receive one-half of the profits and returns resulting from the working of the mines, and that until defendant received something from Dean and Thomson issuing out of the working of the mines, the plaintiff had no claim against defendant.

The learned Judge entered a verdict for defendant, being of opinion that the consideration received by defendant from Gilbert was not profits and returns derived from the share in the mining lands.

In Easter Term, *Jellett* obtained a rule *nisi* to set aside the verdict, and enter a verdict for the plaintiff, or for a new trial, on the grounds following: that the verdict is contrary to law and evidence, it having been shewn that the defendant received money which was profits and returns within the meaning of the defendant's covenant, half of which he should have paid over to the plaintiff; and that being so received, the plaintiff should have had a verdict on the count for money had and received.

During last Michaelmas Term, *Wallbridge*, Q. C., shewed cause, and *Jellett* supported the rule.

MORRISON, J., delivered the judgment of the Court.

It is quite clear that by the agreement of the 26th October, 1863, the plaintiff sold and assigned all his right, title, and interest in the lands in question to the defendant, the consideration being \$100, and in consideration of his receiving half of whatever profit might be derived from the share agreed (by the therein recited agreement) to be given to the plaintiff by Dean and Thomson; and that, by the agreement of the 23rd November, 1863, the defendant covenanted with the plaintiff that he would account for and pay over to the plaintiff one-half of whatever profits or returns might be derived from the share assigned to defendant so agreed to be given to said plaintiff by Dean and Thomson.

The question is, what is here meant by the words profits or returns? The plaintiff contends he is entitled, under that covenant, to receive from the defendant one-half of the amount he received from Gilbert upon a sale and transfer of one undivided half of his, the defendant's, interest and estate in the lands mentioned in the agreement

of the 26th October, &c. It seems to us that such was not the intention of the parties, nor is it the proper construction to put on the covenant.

The stipulation at the end of the agreement and following the covenant is a key, we think, to the intention of the parties, viz.: that the plaintiff "shall not have to pay or advance any moneys or labor in the working of the mines, or any of them." That stipulation shews, that in the expectation of the parties the mines were to be worked, and the profits and returns were to be such as would be derived from their working, and without the plaintiff having to contribute to the expenses of working them. If the plaintiff's contention is right, the plaintiff only in effect assigned one-half of his interest in the agreement and the lands, and that the plaintiff and defendant *quoad* these lands were co-partners, which is quite inconsistent with the whole tenor of the agreements and the covenant. The view taken by the learned Judge at the trial was the correct one, namely, that the defendant sold to Gilbert only one-half of the one-third share, and transferred to him the liability to account to the plaintiff for half the profits that might arise from such share of these mining lands; in other words, defendant sold merely half of his own beneficial share in the lands, and that the moneys he received on such sale were not moneys within the meaning of the covenant declared on.

The rule must therefore be discharged.

Rule discharged.

O'DAY ET AL V. BLACK.

Will—Construction—Agreement to sell land—Subsequent devise to vendee.

B. owning the south half of lot two, agreed under seal in 1859 with the defendant, his son, to let him have the east twenty acres in consideration of work done, and to convey it so soon as defendant should get it surveyed. In 1860, he, by his will, devised to his wife, for life, all that part of lot two "now owned by me," and to the defendant, in fee, "twenty acres of the east side of lot two, which I do now own." The remainder of his estate, at his wife's death, he devised to his daughters the plaintiffs, on condition of their supporting their brother E., who was not in his right mind. It appeared that two and a half acres of the lot had been sold by B., but whether conveyed or not was not shewn, and that after the agreement defendant with the others had continued to live upon the lot as one family.

The mother having died, the daughters claimed the twenty acres west of the easterly twenty acres, while the defendant contended that this passed under the devise to him, not the east twenty acres of which he was already entitled to a conveyance under the agreement.

Held, 1. That parol evidence was inadmissible that the twenty acres intended to be devised to defendant was the land in dispute.

2. That the plaintiffs were entitled to such land, for the defendant was wrong in his contention, and the devise to him was of the land which the testator had agreed to convey, but had not conveyed, to him.

EJECTMENT for the twenty acres immediately west of the easterly twenty acres of the south half of lot two in the second concession of the Township of London, in the County of Middlesex.

Both parties claimed under the will of George Black, deceased.

The cause was tried before Morrison, J., at London, in March, 1870.

The evidence shewed that George Black, the testator, became the owner in fee of the south half of said lot two, by a conveyance from the Reverend Benjamin Cronyn, on the 3rd of April, 1840.

On the 31st March, 1859, by agreement between the testator and the defendant, the testator agreed to sell to defendant the east part of lot two in the second concession of London, and better known as twenty acres running along the east side of said lot, and the testator agreed to give to the defendant the land, in consideration of work

done for him, the testator; and the conditions were that when the defendant got the twenty acres surveyed by a competent surveyor, the testator would give him a deed "at and for the price or sum of according to the foregoing conditions, which have been duly fulfilled by the party of the second part" (a) (the defendant). The testator reserved for his own use a quantity of rails that were split on the said land, and the defendant agreed to let the testator take them away any time inside of six months. The testator covenanted to convey according to the terms of the agreement, and that he would suffer defendant to occupy until default in the payment of the said sum of money or some part thereof. The agreement was under seal, and registered in the County Registry office on the 11th June, 1859.

On the 17th August, 1860, George Black made his last will, the execution of which was admitted.

He devised to his wife, Jane Black, all his real and personal property so long as she lived: "namely, all that part of lot two in the second concession of the Township of London, now owned by me, and all my chattels thereon."

Second. He devised and bequeathed to the defendant, to his heirs, executors, and administrators forever, "twenty acres of the east side of lot two in the second concession of the township aforesaid, which I do now own."

He then willed the remainder of his estate and chattels, at his wife's death, to be divided equally between his daughters, the female plaintiffs, on condition of their supporting his son, Robert Ewan Black, who was not in his right mind.

It was admitted that the testator died on the 20th of August, 1860, and that his widow was also dead at the time this action was brought. The notes of the learned Judge did not shew how the easterly twenty acres were

(a) The agreement was on a printed form of agreement for sale, with the special conditions inserted in writing, and the printed parts inapplicable were not struck out.

occupied after the agreement was entered into between the testator and the defendant. But he was under the impression that the whole of the front half of the lot was occupied as one farm, the testator, defendant, and the rest of the family residing together in the dwelling on the premises.

The defendant's counsel, at the trial, contended :

1. That he had a right to select any easterly twenty acres under the will. This was overruled.

2. That, taking the will and agreement together, he had a right to the twenty acres now in dispute, the easterly twenty acres of the half lot being his under the agreement.

3. He proposed to prove by the person who drew the will that the twenty acres devised to the defendant in the will were the twenty acres in dispute, and that the plaintiff admitted it was so after the death of the testator ; and also the expressions of the testator just before he made his will.

4. He desired to prove the intention of the testator by one of the witnesses to the will, and also what he (the witness) had said on the subject, that witness now being interested in the event of the suit.

The learned Judge refused to admit the evidence, and directed a verdict for the plaintiffs, with leave to defendant to move to enter a verdict for him, if the court should be of opinion that upon the deed to the testator put in, the agreement between him and the defendant, and the will itself, he should have held that the defendant was entitled to a verdict.

In Easter Term last, *Crombie* obtained a rule *nisi* to enter a verdict for the defendant, pursuant to leave reserved, on the ground that on the construction of the will and documents adduced in evidence at the trial, the defendant was entitled to a verdict ; or for a new trial, on the ground of misdirection, in directing a verdict for the plaintiffs, when the defendant was entitled to a verdict, on the same grounds as above stated, and on the ground of

the improper rejection of evidence by the learned Judge, and that the verdict was against law and evidence.

During Michaelmas Term, *English* shewed cause. The learned Judge was quite right in rejecting the parol evidence as to the intention of the testator. That can only properly be gathered from the will itself and the surrounding circumstances: *Wigram on Wills*, 8, 10, 106. *Miller v. Travers*, 8 Bing. 244 is a leading case on the subject of rejecting parol evidence as to the intention of the testator, and is followed by the Court of Exchequer in *Doe Hiscocks v. Hiscocks*, 5 M. & W. 363. There are other cases in which the parol evidence was rejected; but evidence of surrounding facts is admissible to put the court as nearly as possible in the situation of the party who prepared the instrument: *Quennell v. Turner*, 13 Beav. 249; *Goodtitle d. Radford v. Southern*, 1 M. & S. 299; *Doe Chichester v. Oxenden*, 3 Taunt. 147; *Doe d. Browne v. Greening*, 3 M. & S. 171; *Grey v. Pearson*, 6 H. L. Cas. 61, S. C. 3 Jur. N. S. 823, 29 L. T. 67; *Davidson v. Boomer*, 15 Grant 218. The testator was the owner of the south half of the lot and the east twenty acres are what he devised to defendant, and it was right he should do so, having agreed to give him a deed of it. If he had desired to give him more, he would have said in the will, being in addition to the twenty acres I have already agreed to convey to him.

Crombie, contra.—The term owner and proprietor means in the ordinary sense beneficial owner, and the defendant was such owner of the land in question, not the testator. He could recover for the value of any buildings on the property erected by himself, if he had insured them, and they were destroyed by fire. If in possession, and the land were taken by an incorporated company bound to indemnify owners or proprietors, he would be entitled to compensation: *Lister v. Lobley*, 7 A. & E. 124; *Rex v. Kerrison*, 1 M. & S. 440; *Milligan v. Equitable Ins. Co.*, 16 U. C. R. 314; *Marshall v. Hopkins*, 15 East 309; *Ross v. The Commercial Union Assurance*

Co. of London, 26 U. C. R. 552. The agreement to convey also implies that the defendant was in possession. Parol evidence must be admitted to show even what part of the lot would be covered by the deed to the testator, and that evidence would also shew that the east twenty acres would be covered by the agreement to convey to defendant, who was in truth the beneficial owner, and therefore it must be intended that the additional twenty acres were intended by the devisee. The easterly twenty acres, under the agreement, was to be defendant's to compensate him for his labor, and the devise would be independent of that. By the parol evidence clearly admissible an ambiguity was raised, and therefore the further evidence to shew testator's intent was admissible: *Tay. Ev.*, 4th ed. sec. 1082; *Jarman on Wills*, 3rd ed., 301, 396.

RICHARDS, C. J., delivered the judgment of the Court.

We think the learned Judge was right in refusing to admit parol evidence as to the intention of the testator that the twenty acres in dispute should be given to the defendant. *Miller v. Travers*, 8 Bing. 244, is a leading case on the subject, and seems to have been followed very generally in the decided cases since. The rule in relation to the interpretation of wills and other written instruments is thus stated by Lord Wensleydale in the House of Lords, in *Grey v. Pearson*, 6 H. L. Cas. 107: "I have been long and deeply impressed with the wisdom of the rule now I believe universally adopted, at least in the courts of law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further. This is laid down by Mr. Justice

Burton, in a very excellent opinion, which is to be found in the case of *Warburton v. Loveland*, 1 Hudson & Brooke, Ir. Rep. 648. The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing. To ascertain which every part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instrument, according to the principle laid down in the excellent work of Sir *James Wigram* on that subject."

In *Dodd v. Burchell*, 1 H. & C. 120, *Pollock*, C. B. said :—"The law seems to me to be particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury. In some cases it may appear a hardship that a party is not allowed to shew that the language of a deed does not express his meaning ; but why should a solemn instrument under seal be set aside because certain facts exist from which a jury might infer that the parties did not mean what they have said ? It must be admitted that in some cases there have been expressions of regret at the operation of general rules of law. That more frequently occurs in the construction of wills, where the Courts have said that although the testator may not have meant what he has written, they must decide according to the language he has used." *Martin*, B. said, in the report in 8 Jur. N. S. 1181, "In order to understand the meaning of the instrument you should put yourself in the position of the grantor and grantee, and read it with all the knowledge they had at the time upon the subject. Having assumed this position, the writing is to decide the rights of the parties."

Now we are to discuss this will on the same principle. Having the knowledge of the surrounding circumstances, the fact of the 100 acres having been conveyed to the testator and his having agreed to convey the east twenty acres to the defendant, what did the testator mean by bequeathing to his son, the defendant, "twenty acres of the east side of lot two in the second concession of the township aforesaid, which I do now own." What do these words mean, interpreted by the facts we have properly had placed before us, rejecting, as we think the learned Judge properly did, the parol evidence to shew the intention of the testator as tendered at the trial?

The devise to his wife was of all his real and personal property "so long as she lives, namely, all that part of lot two in the second concession of the Township of London, now owned by me, and all my chattels thereon."

Second. He bequeathed to his son "William John Black, to his heirs, executors, and administrators forever, twenty acres of the east side of lot two in the second concession of the township aforesaid, which I do now own."

From a plan put in at the trial it appears that two and a half acres of the south east corner of the lot had been sold by the testator to one Stephenson. It was not stated whether it had been conveyed or not, and the east twenty acres of the lot are marked on the plan. If the testator had not conveyed away or sold any part of the lot he had purchased, the natural way to have described it, when giving all to his wife for life, would have been, the south half of lot two in the second concession of the Township of London. If he had conveyed the two and a half acres of the south west corner, that might account for the mode of description resorted to rather than the one suggested, though in the way it is described in the will would also be more correct as intending to convey the south half of the lot which was all he ever owned. If he understood and was using the technical language of a chancery lawyer, he might also have considered that by the agreement his son was the

owner of the easterly twenty acres, and therefore that was a part of lot two which he himself did not own. If the chattels devised to the wife were on the east forty acres of the lot, as well as the rest of the south half of it, that might be a mode of determining also what the testator meant, and if it be established that the mother took from the eastern side line of lot two, that would determine the part intended to be devised to the defendant.

In general the owner or proprietor of land is the tenant in fee, but the term is said to be an equivocal one, and may have a different interpretation according to circumstances. See the cases referred to in *Hopkins v. Provincial Insurance Co.*, 18 C. P. 89.

In Story's Equity Jurisprudence, sec. 790, it is stated, "In the view of Courts of Law, contracts respecting lands or other things, of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident or as a present or future charge. But Courts of Equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made; and it passes by descent to his heir as land. The vendor is deemed in equity to stand seised of it for the benefit of the purchaser, and the trust attaches to the land so as to bind the heir of the vendor, and any one claiming under him as a purchaser, with notice of the trust."

Here there is no doubt that the testator, at any time before his death, could have been compelled to convey the easterly twenty acres to the defendant, after the latter had procured a survey of it. Has he not done by his will that which he was bound to do under his agreement? The words used in the will are a matter of description, and if they

had simply been twenty acres of the east side of the south half of lot two in the second concession of the Township aforesaid, then there would be little doubt that he meant twenty acres off the east side of the south half that he had bought from Dr. Cronyn. Does he mean anything more or less than this when he adds to the words, "twenty acres of the east side of lot two in the second concession of the township aforesaid," the words, "*which I do now own.*" Does he not in fact assert that he owns the south half of the lot, the twenty acres of the east side of which he is devising to defendant?

Suppose the testator had agreed to sell this easterly twenty acres to some one else, and the purchase money had been unpaid, would it be doubted that the fee passed to defendant, though the purchaser might have compelled him to convey it to him on payment of the purchase money? Suppose the defendant himself had bargained for it, and had not paid anything, but had entered into an agreement which could have been enforced against the testator, would this devise not pass the land to him, so that the executors of the testator could not have compelled him to pay them the purchase money for the land?

Taking the legal view of the case, though the testator had agreed to convey the land to defendant he was the owner, and giving the interpretation to the language which men in his situation in life would, that until he had executed a deed conveying land (the legal title of which was in himself) in fee to some other person he was the owner, we think we should determine that what the testator intended to give the defendant was the easterly twenty acres to which he was entitled, and which the testator probably gave to him because he was entitled to it.

It is suggested the view should be taken that defendant was a purchaser for value of the twenty acres, viz., for work done, and therefore it is to be presumed the father intended to give him an additional twenty acres as a bequest. If they all lived together in one family, it is pro-

bable they had all done work, the other two devisees as well as himself, and it is very obvious that they were burthened and the remainder of the land was charged with the support so long as he lived of a helpless brother of weak intellect, which perhaps may have made it quite correct for the testator to confine his devise to defendant of the twenty acres off the east side.

We all think the defendant's rule should be discharged.

Rule discharged.

KYLE V. STOCKS.

*Lease or agreement for lease—Tenant giving up possession to adverse claimant
—Surrender.*

In ejectment the plaintiff claimed as having been turned out of his possession by defendant without color of right. The defendant claimed under the Grand River Navigation Co., but at the trial he shewed no title.

As to a portion of the property, a saw mill, one B. B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease, but on Monday the defendant put some one else in possession, and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon. *Held*, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title.

One C. B. had leased from the plaintiff part of the property, and being in possession gave it up for \$60 to the defendant, who claimed that it was her own. *Held*, that this was clearly a fraud upon the plaintiff, as landlord, by which the lease was forfeited, and that the defendant could not set up C. B's rights under it.

Semble, The plaintiff having let part of the premises held by C. B. to B. B., who went into possession, and no rent being apportioned for the remainder, that this operated as a surrender of C. B's lease

EJECTMENT by the plaintiff, assignee of the estate of James Farish, for the piece or parcel of land leased by the Grand River Navigation Company to James Farish, known as the Millfield property, and bounded by the canal of the said Grand River Navigation Company on the north, and by the waters of the said Grand River on the south.

The plaintiff in his notice claimed the land as being in possession thereof prior and anterior to the defendant, from which possession he was ousted by the defendant without color of right. The defendant, Jane Stocks, besides disputing the plaintiff's title, claimed title in herself under the Grand River Navigation Company.

The trial took place at the fall assizes of 1869, before Adam Wilson, J., at Cayuga, without a jury.

The evidence given was to the following effect :—

Benjamin Baker said, that *Colin Baker*, his brother, occupied the property for the last seven years, and rented it from Mr. Kyle. Last spring, his brother's term being up; the witness rented it from Mr. Kyle. Kyle rented it to him, and gave him possession on a Saturday. On Monday defendant gave possession to some one else and nailed it up, refusing to let witness go into possession, and he had nothing further to do with it; that was in March, 1869. The witness leased only the saw-mill under a verbal lease for a year. It was intended to be in writing, but was put off to the following week. He took possession, and left that Saturday afternoon for Hamilton; when he returned on Monday one Mitchell was in possession, and said defendant had put him in possession of the mill; defendant also said so, and said that if witness had come to her she would have freely given him possession. *Colin Baker* occupied all the property, except the planing-mill and three dwellings. *Farish* had the place first, then Kyle, and *Colin* dealt with Kyle. *Colin* had possession of all the property he had had in possession before that, except the saw-mill, for some months after witness took possession of the saw-mill; he thought *Colin* was first put in possession by *Farish*; if he made improvements he consulted Kyle about them, and Kyle paid for them, as witness believed, by their being deducted from the rent.

Colin Baker said he rented the property from Kyle, under a document dated 10th December, 1861, (he was to hold for a year, and that had reference to the saw-mill). He held from

the time mentioned in the memorandum until some time in the spring of 1869. He was in possession of all the property, except the planing mill, which Mr. Sweet had rented from Kyle; he paid one rent for all; the rent in the memorandum was \$200. The second year it was reduced to \$175, which he continued to pay; improvements were allowed for out of the rent; the arrangement for the improvements was made with Mr. McNaughton, who acted for Mr. Kyle; Mitchell then had possession of the saw-mill, he got possession from defendant; defendant had possession of one dwelling and two acres of land, and Mr. Sweet has possession of the rest, *i. e.* the planing mill, two houses and two acres of land; defendant collects the rent for Sweet; defendant herself took possession. He, Colin, got the dwelling in 1861; it was given to him because he was complaining of the rent; he was then allowed to occupy all but the planing mill for \$175.

Sweet went in under an agreement dated August, 1865, between Kyle and Appelby. He occupied the planing mill under it, but not the rest of the property; Mrs. Stocks claimed to own the place in May last. Witness got \$60 for giving up possession to her of the cottage and lands lately occupied by James Farish. Before that she had put on men to fence the garden, and took forcible possession of it, and then the witness sold out to her. Defendant said her brother, James Farish, had requested her to come and live there. She offered the witness \$60 to leave the place; she had been trying to drive him out of the place, and had threatened to do it. Sweet went in under the agreement of August, 1865, but he did not stop long under it; there was another lease given for it; Sweet had the planing mill and about an acre of land; witness occupied all that Sweet did not occupy.

Benjamin Baker said the lease was to run from Saturday, and Kyle wrote to him after he gave up the place.

The instrument under which Colin Baker entered was dated, Millfield, Seneca, 10th December, 1861, and purported

to be a memorandum of agreement made between James Kyle, assignee of James Farish and Colin Baker. By it James Kyle leased the saw-mill, containing one gate (next the canal or cut) and a circular saw or edger, for the term of one year, from and after the first day of January next, 1862, in consideration of the sum of \$200, payable quarterly; and out of the quarterly payment Colin Baker was to pay quarterly to the manager of the Navigation Company \$26.25 for the water-rent payable on the saw-mill, the yearly water rent amounting to \$105. Then Baker bound himself to make certain repairs and saw railway ties which Kyle or Farish might require, at six and a quarter cents for oak and one cent for posts. It was signed "James Kyle, assignee, per pro. James Farish," and "Colin Baker," without seals.

The following is a copy of the receipt given by Colin Baker for the \$60 he received from the defendant. "Received, York, May 17th, 1869, from Robert H. Davis, the sum of sixty dollars, being amount agreed upon by Mrs. Stocks to pay me upon giving up possession to her of the cottage and lands at Millfield, lately occupied by Mr. James Farish." (Signed) Colin Baker.

The agreement referred to in the evidence was dated 15th August, 1865, and purported to be made between James Kyle, of the Town of Stratford, assignee of James Farish, of the first part, and James A. Appleby and Albert Sweet, of the City of Buffalo, State of New York, whereby the party of the first part leased all those certain premises known as the Millfield property, with the privileges and appurtenances thereunto belonging, situate, &c., as the same were lately occupied by the said James Farish, for four years from the date, the annual rent to be \$900. Then followed covenants as to repairing and putting in order, and making improvements to the value, at least, of \$2,000. The lessees were not to sublet or assign, and in default of payment of rent, and non-performance of other agreements, the lessor might enter if he chose, and it should have the

same effect as if the lease was at an end. It was expressly agreed that the lease was made subject to any lease that might be outstanding, of the said mills or either of them on the demised premises. There was then the right to purchase on the part of the lessees at any time before the expiration of the lease.

Its attestation was, "In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written." There were three seals appended to the instrument. Opposite the first was signed "James Kyle per pro. James Farish, agent," and opposite the other seals the names of Appleby and Sweet.

For the plaintiff, it was contended at the trial that the lease of August, 1865, was not proved, because it was executed by Farish as agent for Kyle, and Farish was not shewn to have had authority under seal to execute the lease, which was under seal. The defendant's counsel contended the instrument might be used as a document not under seal, and then there would be no objection.

At the close of the case the plaintiff's counsel contended, that as to the portion of the premises which Mrs. Stocks turned Colin Baker out of, the cottage and land, the plaintiff must recover, because she claimed adversely to the plaintiff and not as tenant, and her inducing Colin Baker on payment of the \$60 to quit his claim did not entitle her to hold the land against the plaintiff:—that in regard to the saw-mill there was no term outstanding in Benjamin Baker, and he voluntarily gave up all right to have a lease, and the plaintiff was entitled to recover for that because Colin's lease of that had ended.

The learned Judge thought the plaintiff not entitled to recover for Colin Baker's part; that the transaction between defendant and Colin Baker did not give the landlord of Colin Baker, Mr. Kyle, the right to bring ejectment against the defendant, and as to the saw-mill Benjamin Baker was lessee, and he should have tried to get possession. He

directed a non-suit, with leave to the plaintiff to move to enter a verdict for him for the whole land, or such part of it as the Court might think he was entitled to recover.

In Michaelmas Term, 1869, *MacKelcan* obtained a rule *nisi* to set aside the non-suit, and to enter a verdict for plaintiff, pursuant to leave reserved, upon the following grounds :

1. As to that part of the premises of which the defendant took possession from Colin Baker, on the ground that she did not hold possession thereof as tenant to the plaintiff, having claimed to hold them in her own right, and disclaimed any such tenancy from the plaintiff.

2. As to that part of the premises at one time in the possession of Benjamin Baker, being the saw-mill and appurtenances, upon the ground that the said Benjamin Baker was not a necessary party as plaintiff, and that the plaintiff was not debarred from recovering in this action by means of what had been agreed upon between him and the said Benjamin Baker.

3. As to the whole of the premises, the defendant having turned the plaintiff out of possession thereof, and claimed to hold them adversely to him, and having shewn no title in herself, the plaintiff is entitled to recover.

The rule was enlarged from time to time until Easter Term last, when *Miles O'Reilly*, Q. C., shewed cause. Colin Baker was a tenant from year to year, and had an assignable interest. He having assigned to defendant during the continuance of his tenancy the plaintiff could not eject without notice to quit or demand of possession, *Braythwayte v. Hitchcock*, 10 M. & W. 494. There was a parol lease made to Benjamin Baker. Mrs. Stocks went into possession, and if liable at all she was liable to him: *Archbold's L. & T.*, 2nd Ed., 176, *McKay v. McKay*, 25 U. C. R. 133.

MacKelcan, contra. The defendant claims under the Grand River Navigation Company, and she claimed adversely to the plaintiff and cannot now set up the alleged

lease to Colin Baker. Colin Baker had no subsisting tenancy. As to the lease of the saw-mill, Benjamin Baker was not bound by it, and after defendant getting into possession he declined to take a lease. If there is any defect in the plaintiff's notice of title it may be amended, and the amendment ought to be made if necessary.

The authorities shew that as to the property given up to defendant by Colin Baker, the alleged tenancy of Colin was forfeited, and the plaintiff had a right to recover without notice or demand of possession, particularly as defendant does not claim to hold under the lease in the notice attached to the record:—*Woodfall L. & T.*, 9th Ed., 326; *Cole on Ejectment*, 41; *Doe Gray v. Stanion*, 1 M. & W. 695; *Doe d. Davies et al. v. Evans*, 9 M. & W. 48; *Doe d. Philips v. Rollings*, 4 C. B. 200; *Doe Ellerbrock et al. v. Flynn*, 1 C. M. & R. 137, 141; S. C. 4 Tyr. 619; *Doe d. Graves et al. v. Wells et al.*, 10 A. & E. 427.

As to the saw-mill, there was no tenancy connected with Benjamin Baker. He took no lease, and it was understood that he was to have a written lease. It was to be prepared, but before that could be done defendant had obtained possession by force, and Baker refused to take a lease. It was not intended that the lease should be a verbal one, and the intention of the parties must govern: *Morgan d. Dowding v. Bissell*, 3 Taunt. 67; *Dunk v. Hunter*, 5 B. & Al. 322; *Hegan v. Johnson*, 2 Taunt. 148. If there had been payment of rent there might have been a tenancy, though the general rule is, that an agreement for a future demise by an indenture of lease is incompatible with an actual demise: *Cox v. Bent et al.*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J. Ch. 121. *Hamerton v. Stead*, 3 B. & C. 478, is an authority to shew that by letting Benjamin Baker into possession with Colin Baker of part of the premises included in the demise to Colin under the new lease, the same being done with Colin's consent, Colin's tenancy was determined, and could not now be set up against the plaintiff, though the lease to Benjamin was never granted.

Primâ facie the plaintiff is entitled to recover against

the defendant, for she has intruded on property which clearly for many years was in the possession of the plaintiff and his tenants. That possession is good evidence against all the world but the true owner, and defendant shews no right whatever in herself, and any rights acquired under the plaintiff's tenants are void, because the effect of what the tenants and the defendant did was to shew a disclaimer of the plaintiff's title by the tenants: *Asher et ux. v. Whitlock*, L. R. 1 Q. B. 1; *Robinson v. Smith*, 17 U. C. R. 218; *Shaver v. Jamieson et al.*, 25 U. C. R. 159; *Doe Carter v. Barnard*, 13 Q. B. 953.

RICHARDS, C. J., delivered the judgment of the Court.

The possession shewn to be in Kyle and his tenants is quitesufficient, under the authority of *Asher et ux. v. Whitlock*, L. R. 1 Q. B. 1, to maintain ejectment against a mere wrong doer, which defendant appears to be under the evidence given on the trial.

As to that portion of the premises which was in possession of Colin Baker, his transferring possession to the defendant was clearly a fraud on his landlord, and she cannot now properly set up Colin Baker's right under that lease, which became forfeited by his aiding her to defeat his landlord's title. *Doe Ellerbrock v. Flynn*, 1 C. M. & R. 137, S. C. 4 Tyr. 619, seems a strong authority on this point.

There is much force in the argument that the plaintiff having let the mill part of the premises which were held by Colin Baker to Benjamin Baker, who it is said went into possession, and no rent being apportioned for the remainder, that this operated as a surrender of Colin Baker's lease, and therefore it could not be set up against the plaintiff's recovery.

The only ground on which defendant sets up title in herself is under the Grand River Navigation Company. She shews no title under that Company, and that is a strong argument that she claims adversely to Colin Baker's landlord.

We think the plaintiff entitled to recover that portion held by Colin Baker at the time the saw-mill was leased to his brother Benjamin.

As to that part of the premises in the possession of Sweet, it does not appear that a point was made as to it at the trial, further than contending that the instrument purporting to be a lease to Appelby & Co. was void, and it was not shewn that Farish had the proper authority to execute it. Yet if Sweet entered under it and paid rent for the portion he held, it is difficult to see why as to that the plaintiff should recover without notice to quit or demand of possession. Very little was said as to this part of the premises on the argument, and we assume that it is not now seriously contended that as to the portion which Sweet had in possession the plaintiff can recover in this action.

Then as to the parol lease to Benjamin Baker of the mill and the entry under it, the evidence to shew it was a lease is very meagre. Benjamin Baker says, "Last spring I rented it from Mr. Kyle, my brother's time being up. Kyle rented it to me, and gave me possession on a Saturday. On the Monday after defendant gave possession to some one else, and nailed it up, and refused to let me into possession, and I had nothing further to do with it. This was in March last. It was a verbal lease for a year. It was intended to be in writing, and was put off till the following week. I did take possession, and left that Saturday afternoon for Hamilton, and when I came back on Monday Mitchell was in possession." When recalled, he said the lease was to begin from the Saturday. There is nothing said about the terms of the lease, the amount of rent, or how it was to be payable, nor is it shewn that the terms had been agreed upon, and it appears that both parties contemplated that a written lease should be prepared and executed. There is nothing to shew "that two-third parts at least of the full improved value" was reserved as rent, to make it a good and valid demise under the Statute of Charles, II.

I incline to think the parol lease to Benjamin void on

this ground. The authorities as to what constitutes a lease and what an agreement for a lease are summed up in argument in *Hamerton v. Stead*, 3 B. & C. 480, as follows, "The principle resulting from the cases is, that when an agreement to let is entered into, but it appears to have been the intention of the parties that something further should be done to ensure the interests of either party, such an instrument is not a present lease, but a mere contract for a lease to be granted in future."

Here it could hardly be contended that the parties intended that there should be a parol lease, when it was understood they were to have had a written one, and there can be no doubt, if there had been a written lease, it would at least have expressed the rent which was to be paid.

We think we may properly hold that this supposed parol lease to Benjamin Baker on Saturday, of premises which he refused to have anything to do with on Monday, and which the plaintiff seems to have assented to, and has brought his action against defendant to recover from her possession of the property of which he was to have given a lease to Benjamin on Monday, was in fact no lease at all—the plaintiff and Benjamin not setting it up as a lease, and defendant only setting it up, not as claiming under the plaintiff, but for the purpose of shewing that he had no right to the possession as against her.

We think, on the whole, we should set aside the nonsuit, and order a verdict to be entered generally for the plaintiff, unless it was understood between the parties that the planing-mill, which was in the possession of Sweet under the lease of 1865, was really a matter which was in dispute in this action, as well as the property which Colin had possession of when he was the recognized tenant of the premises.

Rule absolute.

RICHARD MONTGOMERY AND HANNAH MONTGOMERY V.
JAMES S. GRAHAM AND WILLIAM HOBSON.

Ejectment—Alienage—Evidence of having taken oath of allegiance—Presumption—Proof of petition to Executive Council in 1797.

In ejectment both parties claimed through one James Smith. The defendants claimed under Jonathan, his elder brother; the plaintiffs claimed through John, his younger brother, contending that Jonathan, being an alien, could not inherit.

James, Jonathan, and John, were all born in the Province of New York, before the Treaty of Independence in 1783, James about 1770, and Jonathan two years after, their father being a British subject. James and Jonathan came to Canada in 1792, and John in 1794. A copy of a petition to the Administrator of the Government of Upper Canada was produced, certified by the Clerk of the Executive Council, purporting to be signed by the three, one being a marksman, stating that they had come into the Province about four years before, and "had taken the usual oaths prescribed," and praying for a location of 200 acres each. The endorsements shewed that it was received on the 15th May, 1797, and a grant recommended on the following day.

James Smith remained in the Province until his death, in 1843, having lived on the land in question since 1804. Jonathan, in 1801, received a grant of land in this Province, which, among other things, provided that any one coming into possession of the land should within twelve months take the oath of allegiance; but in 1804 he went to live in the State of New York, where he continued till his death, in 1846. John remained in the Province, and died here in 1842.

Held, 1. That the petition was admissible as evidence, without any proof of the signatures.

2. The Court being empowered to draw inferences as a jury, that it might properly be inferred that the three brothers had taken the oath of allegiance before some one properly authorized.

3. That as to James, his remaining in the United States so long after 1783 would shew his determination to become an American citizen, in which case, without reference to our Statutes, he, as an alien, could not transmit the estate either to John, through whom the plaintiffs claimed, or to Jonathan; but that under 9 Geo. IV., ch. 21, having taken the oath of allegiance, his disability was removed.

4. That as to Jonathan, in the absence of anything shewing a previous intention to become an American citizen, his coming to this country, taking up land, and taking this oath, shewed a clear election on his part to become a British subject, and his return to the United States could not make him the less one.

It was *held*, therefore, that the plaintiffs' case failed, Jonathan being entitled to inherit.

EJECTMENT for lot number 8 in the broken front, and number 8 in the second concession from Lake Erie, in the township of Bertie, in the county of Welland.

The action was commenced on the 28th July, 1863.

The plaintiff Hannah Montgomery claimed one undivided eighth part as one of the heiresses-at-law of John Smith, and seven undivided eighth-parts under and by virtue of a deed from Robert Smith, Mary Goodell, Newton Goodell, Nathan Smith, Joseph Smith, Henry Vanderburgh, James Vanderburgh, Elizabeth Soales, and Daniel Soales, to Hannah Montgomery, bearing date 7th April, 1863.

The defendants, in the notice of title, besides denying the title of the plaintiffs, asserted title in themselves by length of possession, and also under and by virtue of a deed from Jonathan Smith, as eldest brother and heir-at-law of James Smith, to and in favor of the defendants, dated 19th August, 1843.

The cause was taken down to trial at the Spring Assizes of 1868, at Welland, before Morrison, J., when it was agreed that a verdict should be taken by consent for the plaintiffs, with leave to defendants to move to enter a non-suit, if the Court should be of opinion, from the evidence, that the plaintiffs were not entitled to recover; the Court to have power to draw inferences as a jury, and the defendants to have the benefit of the objections taken on a former trial.

All parties claimed through James Smith, who died in possession of the land in dispute on the 4th of August, 1843, intestate and unmarried. The plaintiff Hannah claimed through her father, John Smith (and by deeds from her brothers and sisters as his heirs), as the brother of James. They were both sons of Robert Smith. Robert, the father, was born in the United States, in Philadelphia, before the Revolutionary War. His father was a Scotchman. He continued to reside in the United States until his death, which took place about 1827 or 1830, after the last American War.

The evidence on both sides was to the effect that Robert's three oldest children were born in the following order: 1. James Smith, the eldest son, who died seised of the *locus in quo*; 2. Jonathan Smith, under whom the defend-

ants claimed by a deed; 3. The plaintiffs contended that John Smith was the next born, and they claimed through him. But the defendants contended that Robert Smith and Mary Smith, twins, were born next in succession to Jonathan.

In the event of it being necessary to ascertain if Robert or John were the elder of these two brothers, the question of the regular taking of the evidence under two commissions, issued on behalf of the plaintiffs would arise.

James Smith, from the evidence, was born about 1770, and Jonathan about two years after. James, Jonathan, and Robert, came to Canada in 1792, and David and John two years after (1794).

A certified copy of a petition to His Honor Peter Russell, Administrator of the Province of Upper Canada, in Council, was put in, certified by the Clerk of the Executive Council to be a true copy of the original petition, and of the indorsements thereon, filed in the Executive Council Office.

It was endorsed, "Received 15th May, 1797. Read 16 day. Recommended for 200 acres each, but there must be three warrants. P. R.—Gave a warrant for the above 16th May, 1797."

It was objected on behalf of the plaintiffs that this was not admissible evidence.

It was entitled, "The petition of James, Jonathan, and John Smith," and shewed "that your petitioners came into this Province about four years ago, and have taken the usual oaths *prescribed*, the declaration that they profess the Christian religion and obedience to the laws. Wherefore pray your Honor would be pleased to allow them a location of 200 acres each." It purported to be signed by James and Jonathan Smith, and by John Smith as a marksman.

James Smith resided in Upper Canada from the time he came into the Province until his death in 1843, which occurred, as seemed to be admitted, before the 19th of August of that year. He lived on the lot in question from about 1804.

Jonathan remained in Upper Canada, residing in the township of Bertie, near where James lived, until 1804, when he went to reside in Chatauque County, in the State of New York, where he continued to reside until his death in 1846.

The exemplification of a Government Patent, dated 10th of August, 1801, was put in, granting to Jonathan Smith, of the township of Bertie, in the County of Lincoln, in the District of Niagara, yeoman, in fee simple, lot 14, in the township of Burford, in the County of Oxford, containing 200 acres. The deed contained a proviso for the erection of a dwelling within three years, with some person resident for one year.

The pay-roll of a company of the first regiment of York militia from the 2nd September to the 3rd October, 1813, inclusive, was put in, shewing a receipt by John Smith of 4s. 6d. for his pay. One of the officers of the Company proved at the trial that he knew John Smith, who was the father of the plaintiff Hannah Montgomery. It was shewn that he resided on Yonge Street, in 1802, and that he served in the militia during the war of 1812, and that he died in 1862.

Evidence was given to shew that all who served in the war of 1812 as militiamen took the oath of allegiance.

It was admitted that Jonathan Smith had conveyed the lands in question to the defendants by deed dated 19th of August, 1843, and that the heirs of John Smith, deceased, had conveyed to the female plaintiff the said property.

A verdict having been entered for the plaintiffs, as before mentioned :

In Easter Term, 1868, *James Miller* obtained a rule *nisi* to set aside the verdict and enter a non-suit or verdict for the defendants, pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence, and for the reception of improper evidence, on the following grounds :

1. That James Smith, through whom the plaintiff claimed, was an alien, and although he died in this Province he never became a British subject, and had no estate to transmit.

2. That if he could transmit his heir-at-law would be his father, who, though born a British subject, was during the American Revolution a resident of one the colonies which became one of the United States, and after the said Revolution continued to and always did up to his death reside in the said United States, and was an American citizen, and in consequence no descent could be traced through him.

3. That John Smith, through whom the plaintiffs claim, was not the heir-at-law of James Smith, and was born in the United States of America, and that he never took the oath of allegiance before any person authorized to administer it, and could not inherit real estate in consequence.

4. That Jonathan Smith, through whom the defendants claim, was and always continued a British subject, and was, in default of others, entitled to claim and inherit the premises in question, and conveyed the same to the defendants; and shews title out of the plaintiffs.

5. If Jonathan was not entitled, Mrs. Wilson and Mrs. Graham, sisters of James Smith, were both in this Province in 1820, having in it their settled place of abode; and being British subjects, without taking the oath of allegiance under the Statute of 1828, are the persons entitled to claim the premises, and not the plaintiffs.

6. That the learned Judge who tried the cause should have directed the jury that the evidence was insufficient to entitle the plaintiffs to recover, and should have ordered a nonsuit.

7. That the learned Judge allowed a commission to be opened and read which should not have been opened and read, as it was never returned to the Court from whence it issued, but was brought by one of the plaintiffs to the Clerk of Assize.

8. That the commission appeared to have been tampered with: that the affidavit of the due taking of such examination was not sworn before or certified by the mayor, chief magistrate, or other person, as by statute directed.

The rule was enlarged from to time until Easter Term, 1869, when

M. C. Cameron, Q. C., shewed cause. James, having come to this country in 1794, and having resided here until his death in 1843, is entitled to all the privileges of British birth, under the Alien Act of 1828. Though Robert the father was an alien, James and John both being subjects, the descent could be traced through him, and Jonathan, being an alien, could not inherit: *Doe Hay v. Hunt*, 11 U. C. R. 367. Jonathan was not the heir of James. He was an alien, and the descent could not be cast on him. He did not take the oath of allegiance. He left Canada in 1803, and resided in the United States up to his death; he remained there during the war of 1812.

John is shewn to have been the next in order of birth. He served in the war of 1812, and took the oath of allegiance, and was therefore entitled to the land as the heir of James. No one states Robert to have been older than John except Mrs. Graham, the mother of one of the descendants.

S. Richards, Q. C., and *James Miller*, contra. Jonathan, a natural born subject, came here in 1794, and remained here until 1804. As he drew land from the Crown he must have taken the oath of allegiance. He was barely twenty-one when he came here and made his election to become a British subject, and remained here two years. He left, as shewn by the evidence, to go to the United States for a temporary purpose: *Irwin v. McBride*, 23 U. C. R. 570. John could not inherit, Robert being the older, and if John did take the oath of allegiance, it is not shewn that it was taken before some person duly authorized to administer it. John would be obliged to trace his descent from his father, under 4 Wm. IV. ch. 1. secs. 4 & 5, and he was an alien.

Under 11 & 12 W. III., ch. 6, the child of an alien born a British subject may inherit, though the father was an alien. Here the father was not born out of the King's allegiance: *Doe dem. Thomas v. Acklam*, 2 B. & C. 779; *Doe dem. Achmuty v. Mulcaster*, 5 B. & C. 775. When the party

was born in the United States before the Revolution, it became a matter of election whether he should be a British subject or an American citizen. Jonathan shewed that he elected to become a British subject : *In re Bruce*, 2 C. & J. 436 ; S. C. 2 Tyr 475 ; *Fitch v. Weber*, 6 Hare 51. Jonathan received a grant of land from the Crown, and was under the Alien Act a British subject. That Act does not necessarily apply only to those resident in the Province. The Act having declared them British subjects, it must be shewn affirmatively that they are not, in consequence of omitting to do something, or in consequence of something they have done. The petition, praying for the grant of land, shews they did take the oath of allegiance.

They referred to *Doe McDonald v. Cleveland*, 5 O. S. 117 ; *Doe Patterson v. Davis*, 5 O. S. 494 : *Doe dem. Stansbury v. Arkwright*, 5 C. & P. 575 ; *Wallace v. Hewitt*, 20 U. C. R. 87, 98 ; *Wallace v. Adamson*, 10 C. P. 338, 16 C. P. 578 ; *Fisher v. Johnston*, 24 U. C. R. 616.

RICHARDS, C. J., delivered the judgment of the Court.

The first question to be considered is the political status of James, Jonathan, and John Smith, without reference to the Provincial Statute of Upper Canada commonly called the Alien Act.

They were all born before the American Revolution in the Province of New York, of parents who were then British subjects. The defendants contend that John was not born until 1776 ; the plaintiffs contend he was born before that year. At all events, they were all born before the treaty of September, 1783, whereby His Majesty King George the Third acknowledged the then United States of America to be free, sovereign, and independent States, and relinquished all claims to the government of the same for himself, his heirs and successors.

What then was the position of these three brothers when they came to this country in 1792 or 1793 ? The

eldest, James, must have been 22 or 23 years of age, and he had resided in the United States for nearly ten years after the treaty of 1783. Did he, by so residing there, elect to become a citizen of the United States? The decided cases seem to lay it down that it is a question of election. In *Doe Thomas v. Acklam*, 2 B. & C. 779, the plaintiff was born in the United States after the treaty of 1783. Her father, who was born and married before the treaty, remained in the United States till his death. The Court held he was not a British subject at the birth of his daughter, and she could not, therefore, inherit as a British subject.

In *Doe Auchmuty et al v. Mulcaster*, 5 B. & C. 771, the plaintiff's father was born in the United States before the Revolution, and joined the royal standard. After the peace he went to England and resided there about two years, and afterwards was appointed by the British Government, secretary to a board of commissioners which met in New York in 1785. He accordingly went to New York, and afterwards married a British born subject, and resided there until his death in 1812. The plaintiffs were all born in New York after the father returned there.

In arguing, Chitty said, in *Doe v. Acklam* the remaining in the United States after the treaty and residing there during the war was considered an *election* by the party to become an American citizen, and to put off his allegiance as a British subject. In this case the father elected to continue a British subject, and he could not afterwards, if he had wished to do so, get rid of that character. Bayley, J., said in giving judgment, "In *Doe v. Acklam* the parent put off his allegiance at the time of the treaty which enabled him so to do. Here the father took no such step at that time, and the law did not enable him to do so at any future time."

In *In re Bruce*, 2 C. & J. 437, S. C. 2 Tyr. 475, the testator's father was born in Scotland, went to the United States, married and died there. His death took place after 1783.

The testator was born in Maryland in 1764, was sent to Scotland when under 21 for his education, and in 1788 sailed for the East Indies, and resided there until 1818, when he went to America to see his family, and commenced drawing his property there, and died in New York in 1826. When going to the East Indies he entered his name in the ship's books as an American.

In the judgment of Bayley, B., 2 Tyr. 487, it is said, "He had the option of continuing to be a British subject, or of ceasing to be such, and becoming to all intents and purposes merely an American. It seems to us that he made his election of the latter. In 1788, which was after the date of the treaty between this country and the United States, he went to India from this country, describing himself and being entered in the ship's books as an American, which would of itself be sufficient to shew his election." At this time he was 24 years old.

In the view of the law presented by these cases, what was the status of these three brothers? James, the oldest, was about 22 years of age, Jonathan about 20, and John, according to the plaintiffs' contention, about 18, and according to defendants' about 16.

Unless the status of the children followed that of the father, would they not have a reasonable time after coming of age to make their election as to what position they would occupy? In this view Jonathan and John coming to this country to draw land, and the former receiving a grant apparently as a settler before or about the time he was 21 years of age, would shew an election on his part to become a British subject, and having once made his election his subsequently leaving the country and residing in the United States could make no difference.

If James was not a British subject, but was an alien at the time of his death, he could not cast the title of the property in dispute on any one, either on Jonathan, who was shewn in evidence to have come to this country about the time of reaching his twenty-first year, and to have received a grant of land from the Crown, or on John, who is

not shewn to have received any grant of land, though he continued to reside here until his death, which only took place a few years ago.

The authorities referred to in *Wallace v. Hewitt*, 20 U. C. R. at p 98 and subsequent pages, shew that when the alien has died intestate the estate becomes at once vested in the Crown without any office found, because no one can inherit from the alien. In *Wallace v. Adamson*, 10 C. P. 338, the same view is taken of the law, as well as in *Irwin v. McBride*, 23 U. C. R. 570.

If we are compelled to look at the position of James simply as to his coming into this Province in 1792 or 1793 residing on a lot of land, and dying here in 1843, then, although he may have been born prior to the treaty of 1783, yet if he is necessarily to be considered as having elected to become an American citizen because he resided in the United States after the treaty of 1783, and after he was twenty-one years of age, then he must be considered an alien, and, in the absence of any other reason for concluding he was a British subject, we must hold him incapable of transmitting this estate to any one.

Now the plaintiffs objected to the petition of the three brothers to the Administrator of the Province in Council, received on the 15th May, 1797, and acted on in Council on the 16th of the same month, being received in evidence.

As to the first ground of objection to its being received, want of evidence to prove the signatures, it is over seventy years since it was signed, and it cannot be expected that evidence can be given to prove the signatures of the parties. The same rule in this respect applies to a document of this sort as to a deed or will. In *Taylor on Evidence*, 4th ed., p. 102, it is laid down that the rule "extends, indeed, to all other written documents; and provided that these purport to be thirty years old, and come from the proper custody, the signature and handwriting need not be proved. In *Wynne v. Tyrwhitt*, the Court observed that the rule was founded on the great difficulty, nay impos-

sibility, of proving the handwriting of the party after such a lapse of time."

If the original of this paper had been produced at the trial by the Clerk of the Executive Council, it could have been given in evidence without further proof of its having been signed by the persons purporting to sign the same.

Then was the certified copy receivable in evidence? The certificate seems signed by the proper officer having the custody of the original.

Under sec. 5 of Consol. Stat. C. ch. 80, "In every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document may be placed, * * * shall be receivable in evidence * * without any proof of the signature or of the official character of the person or persons appearing to have signed the same."

Consol. Stat. U. C. ch. 32, sec. 6, provides, that whenever any book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders the contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court, provided that it purports to be signed and certified as a true copy by the officer to whose custody the original has been entrusted.

We think that the document in question was receivable in evidence. The fact is shewn by other evidence that these three brothers, bearing the same names as those mentioned in the petition, and placed there in the same order of seniority, came to this country about the time mentioned in the petition, and they came to *take* land here. the phrase "take up land" being one frequently in use when taken for actual settlement. We think there is evidence from which we may infer that the James, Jonathan, and John Smith, mentioned in that petition are the three

brothers whom it is proved came to this country to take up land.

The petition was received on the 15th May, 1797, and the petitioners say they came into this Province about four years before that (1792 or 1793), and that they had taken the usual oaths, *presented* (probably meaning subscribed) the declaration that they professed the Christian religion, and obedience to the laws, and they prayed for a location each for 200 acres of land.

Now what were the usual oaths taken, or to be taken, by intending settlers coming into the Province from the United States within ten years after the treaty of peace with those States? It is not presuming too much to say that the oath of allegiance was one of them. That oath was uniformly administered from the time of Charles the II. downwards, when any oath was required to be taken by any person; it might be required of any one who offered to vote at an election. We think we may well infer that they had taken the oath of allegiance, and if we are to draw inferences of fact as a jury, we think we ought so to infer, and that it was taken before some person properly authorized to administer the same, for we will not infer at this distance of time that any person presumed to administer this oath for the purpose of enabling the parties to locate these lands, unless the person was authorized to administer such oath.

On Jonathan coming to this country, *taking up* land, taking the oath of allegiance, receiving his grant of land, and this being done before he became twenty-one years of age, or within a reasonable time after he became of age, there was a clear election on his part to become a British subject; and in the absence of any thing to shew any intention on his part, before that, to become an American citizen, we think we may properly assume he never did elect to become an American citizen, and having clearly evinced his determination to hold by his allegiance of birth, he was in fact after a British subject, and his leaving this

country in 1804 and going to the United States, and dying there, did not make him any the less a British subject.

The evidence as to James, in this respect, is not so strong as it is in regard to Jonathan. There is nothing to shew a grant of land to him, unless it be the lot now in dispute, nor is it shewn that James took the oath of allegiance at all, unless by the statement contained in the petition to the Administrator of the Government in Canada for the 200 acres of land.

Unless James gave strong evidence to shew that he elected to continue a British subject, his remaining so long in the United States after the treaty of 1783 would seem to imply that he had decided to become an American citizen, and if he was such a citizen when he came to Canada, in 1792 or 1793, he would be viewed as any other alien coming into the country, and unless he was naturalized before he died, the decided cases shew that he could not transmit the estate to any one. The only evidence to shew that he ever took the oath of allegiance before any person duly authorized to administer the same, is that contained in the petition referred to.

On this branch of the case, looking at the decisions in reference to parties residing in the United States after the treaty of 1783, I think it very doubtful if James could be considered a British subject, without reference to our own naturalization laws. But if he was a British subject, then, *a fortiori*, in 1802, after Jonathan received his grant of land from the Crown, he was a British subject, and in either view the plaintiffs' case fails. If James and Jonathan were both aliens, then James could not transmit the property either to Jonathan or John. We are of opinion that we may hold Jonathan to have been a British subject, he having made his election to continue so either before the expiration of his minority or within a reasonable time after it.

Under the Provincial Statute of Upper Canada, 9 Geo. IV. ch. 21, assented to by the King in Council on the 7th

May, 1828, it was provided "that all persons who have at any time received grants of land in this Province from the Crown, and all persons who have held any public office in the Province, * * and all persons who have taken the oath of allegiance, * * to his Majesty or his Majesty's predecessors, before any person duly authorized to administer such oath, and all persons who had their settled place of abode in this Province before 1820, and are still resident therein, shall be and are hereby admitted and confirmed in all the privileges of British birth, and shall be deemed and adjudged and taken to be, so far as respects their capacity at any time heretofore to take, hold, possess, enjoy, claim, recover, convey, devise, impart, or transmit, any real estate in his Majesty's dominions, or any right, title, privilege, or appurtenance thereto, or any interest therein, to have been natural born subjects of his Majesty to all intents, constructions and purposes whatsoever, as if they and every of them had been born in his Majesty's United Kingdom of Great Britain and Ireland—provided, nevertheless, that no one (except females) of either of the above description of persons who has not taken the oath of allegiance * * before some person duly authorized to administer the same, shall be entitled to the benefits of this Act, unless he shall take the said oath before some person duly authorized to administer the same."

Under the provisions of this Act, James would become a naturalized British subject; first, from having taken the oath of allegiance, before the passing of the Act, before some person duly qualified to administer the same; or, secondly, from having his settled place of abode in the Province before 1820, and being then, on the 7th May, 1828, resident therein; but to come within the second mode of naturalization, he must have taken the oath after the passing of the Act, before the proper person.

There is no evidence to shew that James ever took the oath, except the reference to it in the petition for the grant

of land. The same evidence shews that Jonathan had taken it, which would have naturalized him of itself, but in addition the evidence shews Jonathan had received a grant of land from the Crown as far back as 1801.

We are of opinion that we should infer from the evidence that both these brothers did take the oath of allegiance before 1828, and before some person duly authorized to administer the same.

In 1797, when they presented the petition to the Administrator of the Government in Council, this Province was not so populous, nor the persons who would be likely to administer the oath so numerous, but that officers of the Executive Government would be likely to know if the oath had been administered by a proper person. The applicants for land would naturally enquire what they were to do to secure a location, and the probabilities are, that when the taking of the usual oaths was a condition precedent to their obtaining a location, that there were persons duly authorized to administer these oaths, and that the parties seeking land would be referred to them to have what was needful done. After such a lapse of time, we think we may safely infer that if it was done at all it was rightly done, particularly if nothing is shewn to repel such a presumption.

The grant made to Jonathan in 1804 of land in Burford contained, amongst other provisions, the following : that within three years he should erect and build on some part of the land a good and sufficient dwelling-house (he not having built or not being possessed of a house in this Province), and cause some person to be residing there for a year, and if the land granted should at any time thereafter come into the possession or tenure of any person either by virtue of any deed of sale, conveyance, enfeoffment, or exchange, or by gift, inheritance, descent, devise, or marriage, such person should, within twelve months next after his or her entry into the possession of the same, take the oaths prescribed by law, before some one of the magis-

trates of our said Province, and a certificate of such oaths having been taken should cause to be recorded in the secretary's office of the said Province. Then follows a clause of forfeiture in default of the performance of the conditions.

If the Government of the day was so strict as to the taking of these oaths in relation to the assignee of the grantee of the Crown, we think we are safe in inferring that they were satisfied that the grantees themselves had taken the oaths before the grant was made.

It is not doubted that Jonathan was the person next in succession to James, and would be the person entitled to inherit in preference to John, if he were a British subject.

We have already shewn that unless Jonathan was a British subject James was not, and Jonathan is in the direct line of inheritance in preference to John.

The following observations of Sir John Robinson, in *Doe dem. Hay v. Hunt*, 11 U. C. R. at p. 370, seem to me may be held as applicable to this case. "Since the Legislature has been content, as regards all future devolutions and transfers of real property in Canada, to abolish wholly the distinction between aliens and subjects, and to allow aliens to acquire an interest in the soil as freely as the others, without limitation or formality, or precaution of any kind, and since this change in our laws and policy has been deliberately sanctioned by the Imperial Government, it ought not to be by any refined or rigid, or doubtful construction, that we should give effect to a principle of exclusion in regard to any past descent of property, which principle has been now wholly rejected and laid aside as applicable to any future descent. The benefit of any real doubt should rather be given in favor of the person next in succession, and he should not be held to have been incapable of succeeding when the disability is not clearly made out."

In the view we take of the case it is not necessary to decide whether the evidence taken under the commission at the trial was properly receivable or not from the defec-

tive manner in which the commission was executed, nor is it necessary to decide which of the brothers John or Robert were the elder, for neither was entitled to the estate in preference to Jonathan, as all admit, unless it could be shewn that Jonathan was incapable of inheriting. We think the plaintiffs fail to shew this, and that the case fails, and a verdict should be entered for the defendants, pursuant to leave reserved.

Rule absolute.

MASON, ASSIGNEE OF F. D. CUMMER, v. THE GREAT WESTERN RAILWAY COMPANY.

Sale of wheat—Property held not to pass—Conversion into flour—Endorsement of shipping receipt to Bank—Re-indorsement, effect of—Jus tertii.

M. & Co., at Guelph, bought a car-load of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was endorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days' sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants, upon C.'s order, to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, was delivered by him to the defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-indorsed to them. C.'s assignee, having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co. The case having been tried without a jury:

Held, that M. & Co., on the re-indorsement by the bank to them, were in as of their former title, not as assignees of the bank with the rights given to the latter by the statute, and that their rights must be considered as if the bank had never intervened.

2. That the defendants were entitled to set up the title of M. & Co. as a defence.
3. *Wilson, J.*, dissenting, that as between M. & Co. and C., the insolvent, the property in the wheat did not pass to C. until paid for, it being the reasonable presumption from all the circumstances that this was the intention of the parties.
4. That the conversion of the wheat into flour made no difference, for, looking at the usual course of business in such matters, this flour, though not made from the identical wheat, should be regarded as the produce of it.

The defendants, therefore, were held entitled to succeed.

DECLARATION. First count—That the defendants converted to their own use and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, a quantity of flour. Second count—That the defendants detained from the plaintiff a quantity of flour. And the plaintiff claimed a return of the said flour, and \$500 for its detention, and under the residue of the declaration \$1,000.

The defendants pleaded to the first count—1. Not guilty. 2. That the flour was not the plaintiff's.

To the second count—3. Did not detain. 4. That the flour was not the plaintiff's. Issue.

The cause was tried, at the last Spring Assizes at Toronto, before Hagarty, C. J., C. P., without a jury. The evidence was as follows :—

L. A. Cummer.—I am a brother of the insolvent. I had a mill at Waterdown. This flour, about fifty barrels, was ground at my mill. It was the insolvent's flour. He sent wheat from Guelph to the mill. I was to have so much wheat for so much flour. This was in September, or early in October, 1868. I received two car-loads from Guelph. I threw the wheat in with my own. I was to pay freight from Guelph, and to give one barrel of flour for five bushels of wheat; 340 barrels go to a car-load. 150 barrels were sent to defendants, of which the insolvent received 100. A car-load was shipped to him at Toronto. 50 or 55 he did not receive. The insolvent wrote to me that Merton Brothers were to ship a car-load to me. It was a month or so before I heard that defendants would not carry. I then heard there was a dispute. I saw Baker, the station-master, about it. I then found it had been sent to Hamilton. The insolvent lived in Toronto. It was late in October or early in November I gave defendants the last of the flour. Flour was then worth \$4.60 to \$4.70. I think the insolvent failed about the first of November, after I gave defendants the flour.

Cross-examined.—I only know that the insolvent sent

the wheat to me. Both loads came in the same way. The flour was made out of the second load and my own wheat, with which it was mixed. I ground and sold out promiscuously. Can't say how much of the second car-load was in this flour—it is impossible to say. I was buying, for others. I had other wheat, perhaps 300 bushels or less. It could not have been made out of the identical wheat. I may have said it was made partly out of it—the majority of it may have been. I know a good deal of my wheat was in it. I got no receipt or shipping bill from the railway.

For the defence, *Henry Merton* said,—I live at Guelph. This wheat was sent by us. I look at a bill of lading. It is the bill on which the wheat was sent. The draft drawn against it is attached, and we took this up. The shipping bill is dated 3rd November, 1868: "Received from Merton Brothers the undermentioned property, sent," &c.; "consignee's name, Merton Brothers, or order. Care of F. D. Cummer, Waterdown. 1 car spring wheat, 21,000." Endorsed,—Deliver to order Canadian Bank of Commerce, (Signed) Merton Bros., and re-indorsed by Bank to us, "Deliver to the order of Merton Bros." The draft is of the same date, at fifteen days, drawn by us on F. D. Cummer, Toronto, for \$377.28, payable to our order. We endorsed it then to the bank. The bill was drawn so that we could retain the property till the draft was paid. We bought the wheat in Guelph, and shipped it to the insolvent at Toronto, under that bill of lading, to be received by him when paid for. There was no intention that he should have it before he paid for it. We have never sold him but one before.

Cross-examined.—For the first car-load we received the money from the insolvent by express. We bought the wheat on commission for the insolvent, and advanced the money. We made this arrangement some time in October. We merely arranged to buy on commission. I think there was a limit as to price. We are wheat buyers. We sent the

first load in October ; and a few days after we sent the second load. When we arranged, Waterdown was the place named for the wheat to be ground. The draft represents the price, commission, and bank charges. The insolvent authorized us to draw on him at fifteen days. We were to draw through a bank. The bill of lading was attached to the draft without his knowledge. He must have seen it afterwards. The bank kept the bill of lading as security. We heard, through the bank, of the insolvency after the draft was drawn, and after the wheat had gone to Waterdown. We supposed the wheat was sent to Waterdown to be ground. I knew there was a *Cummer* there. I won't be positive if we knew it was to be ground at Waterdown. When I heard of the insolvency I knew the draft was still in the bank's hands current. I telegraphed to defendants to know if they had delivered the wheat, or rather if it was still there. The answer was, the wheat had been delivered to somebody. I learned it was delivered to L. A. Cummer to be ground. We did nothing till we found we had to pay the draft ; then we went to defendants. I saw the superintendent ; told him we looked to him for the wheat. We entered a suit against L. A. Cummer ; it was not tried. I hardly know about it. We allowed our name to be used.

George Palmer, I acted for Merton. They claimed that defendants were liable for delivering to Cummer without the bill of lading. It was thought L. A. Cummer had still a portion of the unground wheat.

W. Baker, Station-master, Waterdown.—The wheat came without the shipping bill ; I gave the wheat to L. A. Cummer without seeing the bill of lading. On the 16th of November I first heard any complaint ; I was telegraphed from Guelph had I still the wheat ; I answered, No. It was on the 5th of November I delivered the last car to L. A. Cummer ; I never gave a receipt to L. A. Cummer for the barrels ; it was delivered a little while after the first receipt, as quickly as

it could be taken to the mill and ground up. It was after the failure I was first spoken to about the flour; I received an order from Duncan & Sullivan to ship to them at Hamilton, claiming through L. A. Cummer; I had no notice of this flour being made of any other wheat than this wheat; I was telegraphed by Merton that the Bank claimed the money; L. A. Cummer told me he was grinding for F. D. Cummer.

Cross-examined.—No shipping bill was sent with the wheat. The wheat was invoiced to L. A. Cummer; a mere direction from our station people at Guelph; I delivered it to L. A. Cummer's teams on F. D. Cummer's order; I advised him of its receipt; F. D. Cummer's order, addressed to me to deliver to L. A. Cummer, was presented by the latter; I know the Mertons as the shippers of the grain or owners, don't know which.

For the defendants it was contended that the property never passed to the insolvent, and it could not till the endorsement of the bill of lading to him; that by the contract the Mertons retained the property till payment. For the plaintiff, it was contended, that the property passed at once by the purchase: that the Mertons had only a lien; that the delivery at Waterdown to L. A. Cummer ended the transaction and determined the lien; and that even if the Mertons owned the wheat they did not own the flour.

Leave was reserved to defendants to move to enter a non-suit, and a verdict was rendered for the plaintiff, damages \$258.50, being for 55 barrels at \$4.70.

In Easter Term last *Anderson* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered, pursuant to leave reserved, on the ground that there was no evidence of the plaintiff's property in the goods for which this action is brought; or to enter a verdict for the defendants, on the ground that they were entitled to the verdict.

In Michaelmas Term last *Harrison*, Q. C., shewed cause.

Defendants were estopped from setting up the *jus tertii* of the Bank or of Merton Brothers, as they received the flour for the insolvent: *Gosling v. Birnie*, 7 Bing. 339; *White v. Bartlett*, 9 Bing. 378; *Holl v. Griffin*, 10 Bing. 246; *Betteley v. Reed*, 4 Q. B. 511. If, however, the Bank or Merton Brothers had obtained their title tortiously or fraudulently, which is not pretended, the defendants could set up the *jus tertii*: *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618; *Cheesman v. Exall*, 6 Ex. 341; *London and North Western R. W. Co. v. Bartlett*, 7 H. & N. 400. The delivery will pass the property, though it was not intended by the seller that it should pass, the vendee getting it in good faith: *Coxe v. Harden*, 4 East 211; *Ogle v. Atkinson*, 5 Taunt. 759; *Schotsmans v. Lancashire and Yorkshire R. W. Co.*, L. R. 2 Ch. App. 332; *Brant v. Bowlby*, 2 B. & Ad. 932; *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 543; *Moakes v. Nicolson*, 19 C. B. N. S. 290; *Falk v. Fletcher*, 18 C. B. N. S. 403; *Gilmour v. Supple*, 11 Moo. P. C. 551.

The Bank had a title to the wheat. When that wheat was converted into flour they and Merton Brothers had lost all right to the property in the flour. In general trover will not lie when the property is so changed that the original article can no longer be identified and delivered: 2 *Bl. Com.*, ch. 26, p. 404; 2 *Kent Com.* 360; *Silsbury v. McCoon*, 6 Hill 427 note (a); *Betts v. Lee*, 5 Johnson 348; *Chandler v. Edson*, 9 Johnson 362; *Baker v. Wheeler*, 8 Wendell 505; *Curtis v. Groat*, 6 Johnson 168; *Silsbury v. McCoon*, 6 Hill 425; *Babcock v. Gill*, 10 Johnson 287. The mixture of the insolvent's wheat with that of his brother, with the assent of Merton Brothers and of the insolvent, prevented the wheat from being claimed, by reason of the confusion: *Wingate v. Smith*, 20 Maine 287.

Anderson supported the rule. The insolvent never had the property in the wheat, for he had no kind of title to it. The documents of title were held by the Bank and by

Merton Brothers designedly, until the wheat was paid for. The shipping receipt was taken in the name of and for Merton Brothers, expressly to prevent the property passing to the insolvent. A shipping receipt or bill of lading do not of themselves pass property; there must be a contract specifically for that purpose. When there is such a contract the endorsement of such a document, or the transmission of it to the vendee, or the making of it out in his name, will be evidence that it was intended by the vendor the property should pass to the vendee. Here there is no contract by which the property was to be changed, and no document of any kind, nor any act as evidence of it; and the mixture of this wheat with that of L. A. Cummer could make no difference: *Ward v. Æyre* 2 Bulstr. 323; Poph. 38; *Addison* on Torts, 322; *Benjamin* on Sales 289. As to damages, see *Morton v. McDowell*, 7 U. C. R. 338; *Mayne* on Damages 207. Defendants are not estopped from disputing the insolvent's title, for they never did anything whatever which affirmed it: *Thorne v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 6 B. & S. 225; *Brill v. Grand Trunk R. W. Co.*, 20 C. P. 440.

WILSON, J.—The insolvent got two car-loads of wheat from Merton Brothers, who bought the wheat on commission with their own means for the insolvent. The first car-load was paid for in cash, but whether before or after it was sent to the insolvent at Waterdown does not appear. It was sent in October; the second car-load was sent in November. It was not paid for by the insolvent. The railway receipt was taken by Merton Brothers, the vendors and consignors, in their own name as consignees. The car so loaded was directed or addressed to the care of the insolvent at Waterdown.

Merton Brothers drew on the insolvent at fifteen days for the price of the wheat, through the Canadian Bank of Commerce, and obtained the money thereon or discounted it with the bank, by endorsing the railway receipt, under the statute, to the bank as collateral security for the payment of the

draft. The draft, with the railway receipt attached, was presented to the insolvent and accepted by him on the 5th of November.

Merton Brothers knew that the wheat, when sent to Waterdown, was to be ground into flour by or for the insolvent. The defendants carried the wheat to Waterdown, no doubt by Merton Brothers' direction or consent. No shipping bill was sent with the wheat. It was invoiced to L. A. Cummer, and a direction was given by the defendants' station-master or other officer at Guelph to their officer at Waterdown to deliver it, as I understand, to the care of the insolvent at Waterdown, in accordance with the terms of the receipt. And the defendants did deliver it, on the order of the insolvent, to L. A. Cummer, who owned the mill at Waterdown.

The wheat went to the person and for the purpose that Merton Brothers intended it for.

The insolvent and L. A. Cummer had an arrangement between them respecting the wheat which was sent to be ground; the insolvent was to get so much flour in lieu of so much wheat.

The wheat sent by car was mixed by L. A. Cummer with his own wheat, and all of it ground together. And he delivered the flour now in question, 55 barrels, to the defendants for the insolvent.

Merton Brothers drew the bill on the insolvent, took the railway receipt in their own name as consignees, and endorsed it to the bank, who were the holders of the draft, for the express purpose of preventing the property in the wheat from passing to the insolvent until he paid for it, which he has not done.

If the wheat had remained in bulk to this time, there can be no doubt that, under all these circumstances, the property in it would never have passed to the insolvent or his assignee.

Merton Brothers certainly owned the wheat at one time. They delivered it to the defendants to keep for

them. They then transferred their interest to the bank, which interest they have acquired again.

By what act have they (still assuming the wheat to be existing in specie) parted with their property in the wheat?

The transmission of it to Waterdown, and the delivery of it there to the insolvent, were only for the purpose of putting it under the insolvent's care at that place.

The property of it, though delivered to the insolvent at Waterdown, did not pass to him, but still continued to be vested in the consignors, who were also the consignees.

It is always a question of intention whether the property passes to the vendee by the contract or not: *Turley v. Bates*, 2 H. & C. 200; *Young v. Matthews*, L. R. 2 C. P. 127.

The fact that the shipping or railway receipt, or bill of lading, is made out in the vendor's name is evidence, if he be an unpaid vendor, that he did not mean the property should pass until he has been paid.

The fact, too, that a bill of exchange has been drawn by the vendor on the vendee, and that the bill has been discounted by the vendor with some third person, to whom the receipt or bill of lading has also been endorsed as security, is stronger evidence that the vendor did not mean the property should pass before payment to the vendee.

These were the facts in *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 543, and they are (still assuming the wheat to remain as wheat) precisely the facts of this case.

The attaching of the draft of the vendor, on the vendee, for the price to the bill of lading, is even evidence that the property was not to pass till acceptance or payment: *Gurney v. Behrend*, 3 E. & B., per Lord Campbell, C. J., p. 631—636.

The putting of the wheat in the vendee's care, in pursuance of the contract, but not entrusting him with any

of the documents or evidence of title, will not divest the vendor of his right of property more than putting the wheat into the vendee's ship or warehouse; and that a delivery on board the vendee's vessel will not alone pass the property to the vendee has been frequently determined: *Moakes v. Nicolson*, 19 C. B. N. S. 290.

This last case is also an authority, if authority were wanting, that L. A. Cummer can stand in no better or different position, as respects Merton Brothers, than the insolvent.

So the making out an invoice in the insolvent's name is not at all conclusive that the property was to pass: *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 543.

In *Brandt v. Bowlby*, 2 B. & Ad. 932, the vendor had not discounted the bill of exchange, nor parted with the bill of lading, yet it was held the property did not pass to the vendee. In other respects, it was similar to the case in 6 Ex. 543.

So, although Merton Brothers bought the goods as agents and on commission for the insolvent, yet having advanced their own money to pay for them they are entitled to retain possession of the wheat, although the property in it may have passed to the insolvent, until they were repaid their outlay: *Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493.

If the wheat had even been sent on account and at the risk of the insolvent, the property would not necessarily have passed: *Ib.* p. 495—497.

There is, however, the further fact to be considered, that the wheat has been converted into flour.

It may operate in a two-fold manner. It is an additional circumstance, it may be contended, from which to presume that the parties intended the property in the wheat should pass to the insolvent, if the conversion of it into flour were made with their joint consent; and whether or not, it is contended that the change effected in the original article by the mere effect of the conversion, has so

altered the rights of parties that the bank and Merton Brothers have necessarily lost their claim to the wheat, and that they have no interest in or power to follow the flour into which the wheat has been converted.

It is material to consider whether the wheat was ground into flour with or without the assent of all parties. The insolvent and L. A. Cummer, no doubt, were consenting to it. Were Merton Brothers consenting parties too?

Henry Merton said, on his examination, that the bill of exchange was drawn on the insolvent in order that they, the vendors, might retain the property till it was paid for, and it was never intended the insolvent should receive or have it before he paid for it. There is no doubt that such was the chief intention of the vendors.

The insolvent was not, however, to pay for the wheat till eighteen days after sight of the bill. He had sight on the 5th of November; the time of payment was not up till the 23rd of the month; yet the wheat was forwarded to him by the vendecs on the 5th of November, under a receipt from the defendants, by which it was to be placed in the insolvent's care.

Henry Merton said,—“ We bought the wheat in Guelph, and shipped it to the insolvent, Toronto, under that bill of lading, to be received by him when paid for.”

The vendors, then, sent the grain to the insolvent under the receipt in question. By that receipt the insolvent was entitled to the possession of the grain. It was not and could not have been expected that the defendants were to keep the grain from the 5th till the 23rd of November, when they had the power to place it at once in the insolvent's care.

It further appears that the vendors knew the wheat was to be ground by or for the insolvent into flour, for Mr. Merton says, “ When we arranged, Waterdown was the place named for the wheat to be ground. We supposed the wheat was sent to Waterdown to be ground. I won't be positive if we knew it was to be ground at Waterdown.”

If this had been a transaction between Merton Brothers and the insolvent, and the bank had not been an intervening party, or if the case is to be considered as only between Merton Brothers and the insolvent, the Bank by payment of the bill to them being now out of the way. I should think that from the whole facts, and the conduct of the parties, that it must and ought to be presumed that the property in the grain did pass to the insolvent, and that such was the real intention of the parties, although the vendors had some undefined idea that, notwithstanding the delivery of the wheat by them into the personal custody of the insolvent, with the knowledge that he was going to convert it into flour, and for the purpose of his doing so, they could still control the wheat and its produce as flour, just as if the original grain had remained intact in the warehouse of the defendants.

When the receipt was endorsed to the bank, the grain was still in specie. The title in it, as it was, passed to the bank; and the bank's title was preserved by the statute, "whether such cereal grains are to be delivered upon such receipt in species, or converted into flour," 31 Vic. ch. 11, sec. 7.

The purpose of the statute was to facilitate commercial transactions by the carriage of the grain to its destination, or by its conversion into flour, notwithstanding its transfer to the bank, just as if it had not been transferred, and to preserve the security to the bank, notwithstanding these mutations, just as if the property transferred had continued throughout in its original condition.

It would have been destructive to trade if the property given in security for advances had been tied up, incapable of transport to another market, or of conversion into flour, for the six months during which, by the statute, such property may be held by the banks.

By the express provisions of the statute, the bank having got security on the wheat did not lose its security upon the produce of it as flour by the mere fact of such conversion.

In the ordinary course of things, the conversion would be by the endorser of the warehouse or shipping or railway receipt. It is his act which is not to prejudice the bank's rights. The statute, I have no doubt, will equally protect the banks as against others claiming from the endorser of the receipt, whether cognizant of the bank's title or not.

And the statute would extend its protection in like manner to all persons claiming title by or from the bank, and enable them to follow the property transferred at its new destination or in its altered form.

But that is not the question here. Merton Brothers do not properly claim from the bank. They are in of their former title. The grain has been retransferred to them, because they have redeemed it by paying the discount. Before the bank had a title at all, Merton Brothers had bought the grain for the insolvent, to be given into his care at Waterdown, that he might grind it into flour.

The bank upon getting the transfer might have acquired rights as to the grain, both against the vendors and vendee of it, which the vendors on a re-transfer or redemption of the property could neither exercise nor possess, though a purchaser from the bank might be able to do so.

In my opinion, Merton Brothers must have their rights considered as if the bank had not intervened in any way whatever, and the statute has no relation to the settlement of their rights.

Did the property in the grain or in the flour pass to the insolvent as against Merton Brothers, by reason of and by the nature of the transactions before mentioned?

The general rule is, as before stated, that on contracts of sale and purchase, whether the property passes or not by the contract depends upon what the intention of the parties was in that respect: *Gilmour v. Supple*, 11 Moo. P. C. 551; *Logan v. LeMesurier*, 11 Jur. 1091.

In *Turley v. Bates*, 2 H. & C. 200, the property passed though the clay, the subject of the sale, had not been

weighed, the defendant, the buyer, being the person who was to have the weighing done, it being the intention that it should pass

In *Woods v. Russell*, 5 B. & Al. 942, the property passed in the ship which was in course of building, although the vendor had to do more work upon it to finish it. To the ssme effect are, *Clarke v. Spence*, 4 A. & E. 448; *Wood v. Bell*, 5 E. & B. 772, S.C. in Ex. Ch. 6 E. & B. 355, affirmed in this respect.

In *Turner v. The Trustees of the Liverpool Docks*, 6 Ex. 540, putting the goods on board the vendee's ship, and stating in the invoice that the goods were shipped by order and for account and risk of the vendee, were held not to pass the property to him, as the vendor had taken the bill of lading in his own name and subject to his own order, which shewed he had no intention of parting with his dominion over it or of vesting it absolutely in the vendee: *Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493; *Falk v. Fletcher*, 18 C. B. N. S. 403.

In *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618, the property was held not to pass, though the bill of lading was made deliverable to the vendee or his assigns, and the goods had arrived at the place of delivery; as the vendor sent the bill of lading to a bank to keep for him till the vendee had accepted the draft, the price of the goods.

Although the property may pass when the price has not been finally agreed on, it may also pass although the vendor has taken the bill of lading in his own name and kept it in his own possession.

Mr. Justice Williams said, in *Joyce v. Swann*, 17 C. B. N. S. 102, "The cases of *Wait v. Baker*, 2 Ex. 1, and *Brown v. Ware*, 4 H. & N. 822, appear to me clearly to establish the distinction, that, if from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shews that there was no intention to pass the property; but that if the whole of the circumstances lead to the con-

clusion that that was not the object, the form of the bill of lading has no influence on the result."

And Mr. Justice Byles, quoting from *Smith's Mercantile Law*, 5th ed., 299, the language of which he adopts, said, of a bill of lading taken in the vendor's name, "It is not conclusive, it only creates a presumption; and it will be for the jury, looking at the whole of the circumstances under which the shipment took place, to say whether the delivery was not for and on account of the vendee, and the bill of lading was made out to the vendor on behalf of and as agent for the vendee, in which event the property will have passed and vested in the intended consignee; or whether it was not intended to preserve the rights of the unpaid vendor until some further act was done by transferring the bill of lading." See also *Coxe v. Harden*, 4 East 211; *Blackburn on the Contract of Sale*, 144.

It is difficult to give such effect to the circumstance of the railway receipt being taken in the vendor's name, and to the non-delivery and non-endorsement of it to the insolvent, placing it on the same footing as a bill of lading, as to hold that Merton Brothers did remain the owners of the wheat until it was converted into flour, and did remain or become the owners of the flour as soon as it was made, contrary to their acts and dealings with the insolvent, and to the inference fairly to be drawn from them.

The receipt or a bill of lading confers or passes no title by and of itself; it may give a right of possession. The property arises from the contract. The dealing with the documentary evidences may shew in what manner, and to what extent, and for what purpose, and on whose account the property they refer to was to be held, applied, or disposed of; but if the dealing with the written evidences is inconsistent with the actual dealing of the property, it must be considered whether the dealing with the property or the dealing with the documents is to determine what the true intent and meaning of the parties were with respect to the property.

I should be disposed to believe that the question would be best settled by the way the property, and not the evidences of it, had been dealt with. And applying that rule I am of opinion, that as Merton Brothers bought the wheat for the insolvent by reason of a contract between them, and sent it to him to be delivered to his care, knowing that when he got it he would grind it into flour, and, as the evidence warrants me in saying, sent it to him almost for the purpose of its being ground into flour, and bargained for no reservation of rights in or to the wheat, or to the flour, the produce of it, that the property in the wheat, or in the flour at any rate,—and that is sufficient for this suit,—passed wholly to the insolvent, and the vendors lost all dominion over it, although they took the railway receipt making the grain deliverable to them, or to their own order, and kept it unendorsed and undelivered to the vendee.

I do not think it necessary to consider the authorities that were cited bearing on the point whether the flour could be followed by Merton Brothers, if the wheat from which it was made were at the time of its conversion into flour still their property; nor whether the particular 55 barrels can be followed because they were not wholly made from the identical wheat which was sent.

The rule seems plain and reasonable, "that whatever alteration of form any property has undergone, the owner may seize it in its new shape if he can prove the identity of the original materials; as if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure:" 2 *Bl. Com.* 404, note (3); 1 *Hale P. C.* 513.

But if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted: 2 *Bl. Com.* 404.

The conversion of trees into boards does not change the property: 1 *Hale* P. C. 513; nor into shingles: *Betts v. Lee*, 5 Johns. 348; *Worth v. Northam*, 1 Iredell N. C. R. 102. But if grain be taken and made into malt, &c., the property is changed, it is said: Bro. Tit. Property, pl. 23.

It is disputed whether the property is changed by the conversion of grain into flour: See 2 *Kent's Com.* 364, and notes, and some of the cases cited in the argument.

As to the right of the defendants to set up the *jus tertii*, the rule is, it may be done when it is in defence of the right of the person for whom it is made, and when the bailment may be said to be determined by what is equivalent to title paramount: per Blackburn, J., in *Biddle v. Bond*, 6 B. & S. 225.

In *Dixon v. Yates*, 5 B & Ad. 340, Parke, J., seems to think that a warehouseman as of course could set up the right of another: "The defendant Yates is a warehouseman, and therefore may set up the *jus tertii*." See also *Ogle v. Atkinson* 5 Taunt. 759; *Thorne v. Tilbury*. 3 H. & N. 534.

In *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 649, Willes, J., applies the like rule to common carriers: "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no enquiry as to the ownership. They have not voluntarily raised the question: it was raised by the demand of the real owner, before the defendants had parted with the goods. The compulsory character of the employment of a carrier furnishes ample ground for so holding." That is, that the law would protect the carrier against the real owner, if he gave up the goods in pursuance of his employment, without notice of the claim of the real owner; and that it would protect him also "against the pseudo owner, from whom he could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him."

So in case of pledge, the pledgor impliedly engages that the property pledged is his own, and if it turn out not to be so, the pledgee may restore it to the lawful owner: *Cheesman v. Exall*, 6 Ex. 341.

A warehouseman or any one else cannot, of course, set up the claim of one who makes no claim for himself, as was the case in *Betteley v. Reed*, 4 Q. B. 511. I refer also to *Brill v. The Grand Trunk R. W. Co.*, 20 C. P. 440, cited in the argument.

I have no doubt the defendants could properly set up in this case the rights of Merton Brothers, as the defence was made upon their right and title and by their authority.

But for the reason given I think the defendants have failed to make out that right. The property must on the evidence be presumed to have passed to the insolvent by the contract, and the subsequent dealings with the property before referred to, with the consent of both vendors and vendee.

I find no intimation of opinion expressed by the learned Chief Justice of the Common Pleas at the trial upon the facts proved, or upon the arguments of counsel before him. We have therefore lost the benefit of any impression or opinion he may have formed, which it would have been satisfactory to us to have had.

In my opinion the rule should be discharged.

RICHARDS, C. J.—I have carefully considered the exhaustive judgment of my learned brother Wilson, which seems to me to be a clear exposition of the law on the different points arising in this suit.

I have not been able to bring my mind to the same conclusion that he has on the facts of the case.

In ascertaining the intention of the parties from what was done with the wheat—the taking of it into the possession of F. A. Cummer, the sending it to Waterdown to be ground, the converting of it into flour, &c.—we must not overlook the fact that all the parties understood this was to be done whilst the draft for the price of the wheat was current, and whilst the bank were the holders of the draft, and the purchase money of the wheat represented by the draft was unpaid.

In this view, then, it seems to me none of the parties ever contemplated the wheat was to become the property of F. D. Cummer until it was paid for. It is true, if we apply strictly technical rules to interpret the intention of the parties, and construe the matter so as to make them prevail against the obvious intent of the parties, we may hold that the wheat was bought for and sold to F. D. Cummer : that Merton Brothers only had a lien for the purchase money : that when they allowed it to go out of their possession and to be manufactured into flour they lost their lien ; when the bill of lading was assigned to the bank on discounting the draft a special lien and property in the wheat passed to the bank under the Statute, and when the acceptance for the payment of which the bank had the special lien was paid the lien of the bank was removed, and Merton Brothers had no claim on the flour, and therefore the assignee of Cummer can claim the property.

I think we are not compelled to take so narrow a view of this transaction. There had been no such course of dealing between Merton Brothers and the bankrupt as to induce us to suppose they intended to pass the property in the wheat to him as a purchaser, and that it was to be given to him as a purchaser on his credit, and that they were to wait on him fifteen days for payment.

On the contrary, it seems to have been the undoubted intention of all parties that the bankrupt should not become the owner of the wheat until it was paid for. The consignment of it to Merton Brothers themselves, the drawing of the draft on F. A. Cummer at Toronto, for the exact amount of the price of the wheat, their commission on it, bank charges, &c., and the endorsing the bill of lading to the bank, which would carry out their intent, all shew what was the real object. The fact that the wheat was bought on commission can, I think, make no difference. It was bought with Merton Brothers' money, and it is not pretended that it was contemplated it should be the bankrupt's until he paid for it.

Suppose Merton Brothers had agreed with F. D. Cummer that they would send the wheat to him that he might get it converted into flour; that they would draw on him at fifteen days for the price, and until his payment of the acceptance the property in the wheat and the flour to be made from it was to be in them. Under such circumstances, could F. D. Cummer say the wheat was his, as against Merton Brothers, until he paid for it? It appears to me the authorities referred to shew that as between the original parties the property would not have passed to Cummer, and if so it cannot pass to his assignee.

When we consider what was intended to be the practical result of the transaction as it actually took place, I think we ought to hold that the property did not pass to Cummer. The original bill of lading consigning the flour to Merton Brothers, the drawing on Cummer for the whole amount due on purchasing the wheat, the negotiating the draft through a bank with the endorsement of the bill of lading to the bank, thereby giving the bank a special lien and property in the wheat, enabling Cummer to manufacture it into flour, and the bank still to retain its lien on the flour, all shew that it was never intended Cummer should own the wheat or flour until he paid for it. None of them anticipated that Cummer was to become a bankrupt, and that Merton Brothers would be obliged to pay the bank to save their own credit, or that when they did pay the bank they intended to deprive themselves of their right to retain the wheat until they received their pay.

I think the reasonable inference to draw from the facts is, that they all intended the property should not pass from Merton Brothers to Cummer until it was paid for. It never has been paid for by him, and I think we should hold what was the obvious intent of the parties—that it was not his.

The injustice of allowing this wheat, which was so obviously intended to be burthened with the payment of the purchase money that was due on it, to go into the

insolvent's general estate free from that burthen is so great, and the injury to Merton Brothers so obvious, that we ought to struggle to prevent the law working such a result. Why should the general creditors of Cummer be allowed to take Merton Brothers' property to pay debts due on the pretence that it was his property, when none of the parties ever contemplated or intended it should be his until it was paid for?

From what took place on the argument, I did not understand that the flour in question was not delivered to the Railway Company as that which was the produce of the wheat in question. I understand that it was delivered as the produce of this car-load of wheat. I did not understand that it was in truth produced from each grain of wheat of the quantity sent by Merton Brothers, but rather, as is now usual in the country when wheat is brought to a mill to be ground, certain flour is turned out as the produce of the wheat, and is so considered by all parties interested, though in fact perhaps not a grain of the wheat delivered aided in producing the flour received for it; it being physically impossible in many instances, as the mills are conducted, that the wheat delivered, and that only, should produce the flour given for it. This, I believe, is now well understood when the flour is set apart as the produce of the wheat. All parties interested are properly considered as concurring in this view, and I think we ought so to hold.

I think all the other points in the case are disposed of, and properly disposed of, by my brother Wilson's judgment, and as the property did not pass to Cummer, it cannot pass to his assignee; and therefore, as defendants are setting up the *jus tertii* in privity with Merton Brothers, we should direct the verdict to be set aside, and a nonsuit to be entered for the defendants, pursuant to the leave reserved.

MORRISON, J., concurred with the Chief Justice.

Rule absolute.

CHARLESWORTH V. WARD.

Collection of taxes—Extension of time—C. S. U. C., ch. 55, secs. 103, 104, 177—27 Vic., ch. 19—Neglect to pay over—Issue of warrant under sec. 177—Computation of time—“ Within twenty days after.”

One M. was collector of a township for 1864 and 1865.

By the C. S. U. C., ch. 55, as amended by 27 Vic., ch. 19, sec. 12, the roll was to be returned to the township treasurer by the 14th December in every year, or on such day in the next year, not later than the 1st May, as the County Council might appoint; and in case of his neglect to collect by the day so appointed the County Council might, by resolution, authorize him to continue the collection; but this was not to affect his duty to return the roll, or the liability of his sureties. It was also enacted that on his neglect to pay over or account, the treasurer should, “within twenty days after the time when the payment ought to have been made,” issue a warrant to the sheriff to levy the sum not paid or accounted for, on his goods or lands.

In January, 1865, he was authorized to continue the collection of the taxes for 1864 until the 1st May then next; and in January, 1866, to continue the collection of taxes for the township “so long as he should be recognized by the municipality of said township.” He did not return the rolls until April, 1867, when a large sum of the taxes for each year appeared not to be accounted for. On the 2nd of that month, the treasurer, under a resolution of the council, demanded payment, and on the 6th he issued his warrant, under which the sheriff, in May, sold the land in question.

Held, that the sale was unauthorized, and that the sheriff's deed conveyed no title.

Per Richards, C. J.—The extraordinary remedy given by the issue of a warrant applies only when the collector neglects to pay over by some time fixed within the period allowed by law; but if the municipality authorize him to continue the collection beyond that period, his liability, and that of his sureties, must be enforced by the ordinary means.

Per Wilson, J.—The demand on the 2nd of April made that the day on which the payment ought to have been made, but under the Statute the warrant could not be issued until the expiration of twenty days from that time, and was therefore premature.

On the 1st January, 1867, the Acts above mentioned were repealed, “saving any rights, proceedings, or things legally had, acquired, or done under them.” *Quære*, whether the right to issue the warrant still existed.

EJECTMENT for lot number 18, in the first concession north-east of the Toronto and Sydenham Road, in the township of Artemisia, in the county of Grey.

The following case was stated for the opinion of the Court:

One Thomas Moore was the owner of the said lot, in fee simple, as grantee of the Crown.

The said Thomas Moore, by three several mortgages, made and executed respectively on the 12th of April, the 8th of May, and the 21st of August, 1867, conveyed the said lot of land to the plaintiff, who, it is admitted, is entitled to the possession thereof, unless under the following facts a better title to the said land became and is vested in one John W. Armstrong, through whom the defendant claims as tenant, and on whose title the said defendant has a right to rely to maintain his possession.

The said Thomas Moore was collector of taxes for the said township of Artemisia for the years 1864 and 1865. He, as such collector, did not return the collector's rolls of the said township for the years 1864 and 1865 until the beginning of April, 1867, when the same were returned in compliance with a resolution of the municipal council of the said townships, dated 5th of March, 1867. When the said rolls were returned it was found on examination thereof that the said Thomas Moore had collected and not accounted for, and neglected to pay over to the treasurer of the said township for the year 1864, the sum of \$1,764.04, and for the year 1865 the sum of \$3,857.94.

The Assessment Act, Consol. Stat. U. C., ch. 55, as amended by 27 Vic., ch. 19, was in force until the 1st of January, 1867, when the Assessment Act 29-30 Vic., ch. 53, came into force. By sec. 103 of said Consol. Stat. U. C. ch. 55, as amended by sec. 12 of 27 Vic., ch. 19, it is provided that on or before the 14th of December in every year, or on such day in the next year, not later than the 1st of May, as the council of the county may appoint, every collector shall return his roll to the treasurer of the township, and shall pay over the amount payable to such treasurer.

On the 28th of January, 1865, the county council of the said county of Grey passed a resolution, that the said Thomas Moore "be authorized to continue until the 1st day of May next (1865) the levy and collection of rates and taxes for the year 1864, of the township of Artemisia."

On the 26th of January, 1866, the said county council

passed a resolution, that "the said Thomas Moore be authorized to continue the levy and collection of taxes for the said township of Artemisia so long as he should be recognized by the municipality of the said township."

On the 5th of March, 1867, the township council of the said township passed the resolution above referred to, in the words following: "Resolved, that Mr. Thomas Moore, collector, be notified if he have not his rolls of 1864 and 1865 duly returned in accordance with the 106th and 107th sections of the Assessment of Property Act of Upper Canada of 1866, by not later date than the 11th day of the present month, the council will take immediate steps to enforce the return; and in such case it be an instruction to the treasurer to demand the said rolls from the said collector on the 12th instant, and on receiving the same he shall examine them, and find out what amount is collected and what uncollected, and submit the same to the auditors, and report to the reeve at the earliest possible date all the information in the premises."

On the 16th March, 1867, the collector promised in writing that if permitted to continue the collection of rates yet unpaid on the rolls for 1864 and 1865, he would immediately and continuously proceed with the collection thereof, and would, on or before the 5th April, 1867, collect and duly pay over to the treasurer of the corporation the whole and every part of the rates of the said years that were collectable, and which he had collected, and return the rolls, duly verified, with schedule, as directed by the Assessment Act.

On the 1st of April, 1867, the said township council passed the following resolution: "That according to the report of the audit of the collectors of 1864 and 1865 by the township treasurer, there appears to be a large amount collected on the said rolls and not paid over; but in view of the possibility of some error in the premises, it be our instruction to the treasurer to take his books down to the residence of the said collector, and compare his receipts

with the credits given and the respective dates thereof, and to obtain any other pertinent information available in the premises for the information of the council. It further appears that the collector has failed to comply with the requirements of previous resolutions of the council as to duly returning his rolls, with schedule, and certified as the law directs; it be therefore an instruction to the said treasurer to demand the immediate custody of the said rolls and of all moneys received by him, the said collector, by virtue of his office on account of the said rolls, and not already paid over, and report immediately to the council or reeve what may have been done in the premises.

The treasurer, on the 2nd of April, 1867, demanded of the said Thomas Moore the amounts above mentioned as the amounts collected and not paid over for the years 1864 and 1865.

On the 6th of April, 1867, the treasurer of the said township issued his warrants, claiming and assuming to act under the authority of sec. 182 of the Assessment Act of 1866 above mentioned, directed to the sheriff of the county of Grey, commanding him to levy of the goods, chattels, lands, and tenements of the collector and his sureties, the respective sums above mentioned. These warrants were on the same day placed in the sheriff's hands.

On the 8th of April, 1867, the said sheriff, under the said warrants, levied upon certain goods and chattels, and upon the said above mentioned lands of the said Thomas Moore, and afterwards, on the 7th of May, 1867, sold the said land to the said John W. Armstrong, under whom the defendant claims; and on the 15th of May, 1867, the sheriff executed a deed of the said land, in pursuance of the said sale, to the said John W. Armstrong, as a trustee, the said John W. Armstrong being then, and at the date of the said warrants, treasurer of the said township. (Copies of the said warrants and deed were annexed to the case).

The said Thomas Moore had duly entered into bonds for the due performance of his office of collector for the years 1864 and 1865, respectively, with two sureties.

The question for the opinion of the Court is, whether the title of the plaintiff under the said mortgages is entitled to prevail over the said warrants of the treasurer of the said township, and the said sale of the sheriff, and the deed executed by him in pursuance of such sale. If the Court shall be of opinion that the title of the plaintiff is entitled to prevail, their judgment to recover the said land shall be entered for the plaintiff, with costs.

But if the Court shall be of opinion that the title of the plaintiff is not entitled to prevail, their judgment shall be entered for the defendant, with costs.

The case was argued during Easter term last.

M. C. Cameron, Q. C., for the plaintiff. The sale cannot be supported. The Consol. Stat. U. C. ch. 55, had been repealed by 29-30 Vic. ch. 53, when the warrant issued, "saving any rights, proceedings, or things legally had, acquired, or done under the said Acts or any of them." This gives no right to continue pending proceedings, or to issue the warrant: *Bryant v. Hill*, 23 U. C. R. 96; *McDonald v. McDonell et al.*, 24 U. C. R. 424. This power to levy summarily is an extraordinary one, and it must be exercised strictly within the Statute. Here no definite time was named for the return of the roll or for payment. Moreover, the warrant was premature. It must be issued "within twenty days after the time when the payment ought to have been made," and this, according to the true construction, means after the expiration of twenty days. There was no demand until the 2nd April. The payment could not be due until then, and the warrant issued on the 6th. [MORRISON, J., referred to *O'Meara v. Foley*, Ir. L. R. 4 C. L. 116.] The conveyance moreover is void. It is made to the Treasurer for the Corporation, but the Corporation cannot hold it for any acknowledged or avowed purpose under the Municipal Act.

Harrison, Q. C., contra. The limitation of time for returning the roll is for the benefit of the Corporation. They can give further time, and their rights should not be prejudiced by so doing. So long as the Township Corporation allow the roll to remain in the collector's hands, neither he nor his sureties can say that he should have been called upon sooner to return it; only the Corporation or the School Trustees can be prejudiced or can complain. Here the roll was legally in his hands, and when the demand for payment was made upon him it was his duty to comply with it. Not having done so, the warrant and the sale under it were authorized: *Newberry v. Stephens*, 16 U. C. R. 65; *McBride v. Gardham*, 8 C. P. 296; *In re McLean v. Farrell*, 21 U. C. R. 441; *Coleman v. Kerr*, 27 U. C. R. 5. As to the position of the sureties, *The Corporation of Whitby v. Harrison*, 18 U. C. R. 603; and *Todd v. Perry*, 20 U. C. R. 649, may be referred to, but here there is no question as to the sureties, for the land sold was the collector's, not theirs. The Statute authorizing the warrant does not say that if not issued within the time it shall be void: *Dwarris* on Statutes, 606, 611.

RICHARDS, C. J.—When the Collector's Rolls of 1864 and 1865 were given to Moore, he being collector for those years, sec. 103 of the Consol. Stat. U. C. ch. 55, as amended by 27 Vic. ch. 19, sec. 12, was in force, and is as follows, as far as relates to townships and counties:—

“On or before the 14th day of December in every year or on such day in the next year, not later than the 1st of May, as the council of the county or city may appoint, every collector shall return his roll to the treasurer of the township, town, or village, or to the city chamberlain, and shall pay over the amount payable to such treasurer or chamberlain, specifying, in a separate column on his roll, how much of the whole amount paid over is on account of each respective rate.”

Sec. 104.—“In case the collector fails or omits to collect

the taxes, or any portion thereof, by the 14th day of December, or by such other day appointed by the council of the county or city as aforesaid, such council may, by resolution, authorize the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes in the manner and with the powers provided by law for the general levy and collection of taxes; but no such resolution or authority shall alter or affect the duty of the collector to return his roll, or shall in any manner whatsoever invalidate or otherwise affect the liability of the collector or his sureties."

Under sec. 177, "If the collector refuses or neglects to pay to the proper treasurer, or other person legally authorized to receive the same, the sums contained on his roll, or duly to account for the same as uncollected, the treasurer or chamberlain shall, within twenty days after the time when the payment ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, * * * commanding him to levy of the goods chattels, lands, and tenements of the collector and his sureties, such sum as remains unpaid and unaccounted for, with costs, and to pay to the treasurer or chamberlain the sum so unaccounted for, and to return the warrant within forty days after the date thereof."

By 29-30 Vic. ch. 53, passed 15th August, 1866, and which came in force upon and from the first day of January, 1867, the Acts amending the Assessment Act passed in 1860, 1861, and 1863, and the Assessment Act, ch. 55 of the Consolidated Statutes of Upper Canada, "are hereby repealed, saving any rights, proceedings, or things legally had, acquired, or done under the said Acts, or any of them."

When the Act of 29-30 Vic., ch. 53, came in force, the following was the position of matters in relation to the collector and the municipality. He had in his hands the assessment rolls for the years 1864 and 1865, the county council of Grey having, on the 28th of January, 1865,

authorized him to continue the levy and collection of taxes for 1864 until the 1st of May, 1865.

And on the 26th of January, 1866, he was, by resolution of the same council, authorized to continue the levy and collection of taxes for Artemisia "so long as he should be recognized by the municipality of the said township."

Sections 104 and 105 of 29-30 Vic., ch. 53, differ very little from sections 103 and 104 of Consol. Stat. U. C. ch. 55, except that the council of the township may appoint a day not later than the 1st of April, instead of the 1st of May, as in the repealed statute, for the return of the collector's roll and paying over of the money; and in case of the failure of the collector to return the roll and pay over the money the council of the township may by resolution authorize the collector, or some other person in his stead, to continue the collection of the unpaid taxes, as in the former Act.

Sec. 182 of the Act of 1866 is in the same words as sec. 177 of Consol. Stat. U. C. ch. 55.

The cases referred to by Mr. Cameron in the argument shew that the Courts have held that the sheriff, in conveying land sold for taxes, exercises a statutory power, and that he must exercise the power under the statute; and when the statute is repealed, and no provision made for the exercise of that power, the sheriff cannot, after the repeal of the statute, convey the lands he may have sold under that very statute, and which, by its terms, he could not have conveyed to the purchaser until a certain time had elapsed, and before the expiration of that time the statute was repealed. The statute imposing the rate and authorizing the sale of the land, in the cases referred to, was repealed, "except in so far as the same may affect any rates or taxes for the present year, or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes, not otherwise provided for by this Act."

The cases referred to by Mr. Harrison decide that the

collector, whilst he retained the roll, had power to collect the taxes unpaid that were to be levied under it after the time mentioned in the statute, 14th of December, for the return of the roll, when the time had not been enlarged by the council of the municipality when the distress for the taxes was made. The effect of the decisions seems to be, that as long as the collector retained the roll and was an officer of the municipality, he might collect the taxes mentioned in it, and having collected the taxes he and his sureties were liable on their bond for not paying them over.

The question here is, whether the warrant authorized by the 182nd section of the Statute 29-30 Vic. ch. 53, and Consol. Stat. U. C. ch. 55, sec. 177, can be issued at any time when more than twenty days have expired after the collector was bound to return the roll and pay over the money by the provisions of the 103rd section of the last mentioned Act, or the 104th section of the other statute, to wit, the 14th of December or the 1st of April or May of the year for which the taxes were to be collected, or in the following year as to the last mentioned days.

The section speaks of the collector refusing or neglecting to pay to the proper treasurer, or other person legally authorized to receive the same, the sums contained in his roll, or duly to account for the same as uncollected. Then the treasurer or chamberlain shall, "*within twenty days after the time when the payment ought to have been made,*" issue a warrant to levy such sum as remains unpaid and unaccounted for.

What is the *time* when the payment ought to have been made, to enable the municipality to exercise the large and unusual powers conferred on them by the section referred to? The only *time* mentioned in the statute then in force was the 14th day of December, or such other day as the municipal council of the county may appoint not later than the 1st day of May in the next year. Now here no other day than the 14th of December was appointed for

the return of the rolls or the paying over of the money, and the power contained in the section to issue the warrant was not exercised within twenty days of that time.

The late Chief Justice McLean, in *Newberry v. Stephens*, 16 U. C. R. 73, referred to a similar provision in 16 Vic. ch. 182, and says, "There must, of course, be a certain time for the payment over of moneys, and *that* time, as it appears to me, is the 14th of December in each year, under the statute, unless the time is extended by the county council, or authority given by the municipality interested to continue the collection. When the time for collection was extended to the 1st of August, the time of payment was fixed for that day, and the collector and his sureties might have been proceeded against for neglect in paying over the amount of the roll, or to account for the same as uncollected."

The extension of time first obtained had reference to the taxes of 1864, and the County Council authorized the collector to continue until the 1st of May, 1865, to levy and collect the rates and taxes for the year 1864. The practical effect of this probably was to enlarge the time for paying over the money or returning the roll to that date, which they were authorized to do as the law then stood.

The subsequent resolution of the township council, passed in 1866, authorized the said Thomas Moore to continue the levy and collection of taxes so long as he should be recognized by the municipality of the township. Here no time is fixed within which he is to pay over the money, and things continued in this state until the law under which they were then acting was repealed.

At that time, then, *the time* when the payment ought to have been made was not fixed, unless it was the time named in the Statute, and the twenty days within which the warrant ought to have issued had then long passed.

Another question to be considered is, what do the words "within twenty days after the time when the payment ought to have been made," mean? Are they to be inter-

preted literally, or is the true meaning that the warrant is not to issue until the expiration of the twenty days from the time?

If the latter be the true meaning, as I understand was urged on behalf of the defendant on the argument, then if the collector can only properly be considered to have been in default after the money was demanded from him on behalf of the council, which was on the second day of April, then twenty days did not elapse before the issuing of the warrant, and in that view it would be void.

I do not, however, feel inclined to put that interpretation on the section. I think the safest rule to lay down, and the one more in accordance with the true meaning of the Statute and the general doctrine as to the view taken of extraordinary and unusual remedies given to enforce the collection of money, is to hold the parties to the strict letter of the law on the subject.

I think this may be carried out by deciding that when the time of returning the roll and paying over the money is fixed within the period allowed by law, and the collector neglects or refuses to pay over the money by that time, that the treasurer of the corporation may within twenty days from that time issue his warrant to collect the amount from the collector and his sureties; but if that is not done within such time, and the municipality authorizes the collector to continue the collection of the unpaid taxes, though it does not alter or affect the duty of the collector to return his roll, or invalidate or otherwise affect the liability of the collector or his sureties, yet the usual legal remedies must be resorted to to enforce those liabilities.

The whole scheme of the assessment law is based on the prompt collection and paying over of the taxes, and when these taxes were imposed the Legislature considered the inconvenience resulting from a delay in the return of the assessment rolls so great, that they would only allow the time fixed in the Act for the final return to be extended by the county council, and that body also allowed the collector to go on collecting after those dates.

The Act of 1866 only allowed the time of returning the roll to be extended to the 1st of April, instead of the 1st of May, as in the former Act; and by the same Act, sec. 116, the treasurer of the local municipality was bound to furnish a statement of the arrears of taxes and school rates, &c., on the roll to the county treasurer within fourteen days after the day appointed for the return and final settlement of the collector's roll, as in the Consolidated Statute; but the further words were added "and before the eighth day of April in every year." At the end of the section it was further provided, and not in the former Act, that the county treasurer should not be bound to receive any such statement after the *eighth day of April* in each year.

Suppose the county council had authorized some person other than the collector to continue the levy and collection of the unpaid taxes, could the municipality not proceed to enforce its remedy against the collector and his sureties by issuing the warrant against them within twenty days from the time he ought to have paid over the money? I should think they could. If so, why not against them when they had authorized the collector to continue to collect the unpaid taxes; and if they could, and the twenty days elapsed before the issue of the warrant, I think they could not do so afterwards, and particularly after the statute under which all the prior proceedings had been had was repealed, and when it did not appear that Moore held the office of collector of taxes for the township.

It is not necessary, in the view we take of the matter, to decide how far the repeal of the Consolidated Statute, with the saving of rights under it contained in the repealing Act, affects the right to issue the warrant under which the land was sold. If it were necessary to decide that question, I should desire further time for consideration and reflection.

It certainly seems to me that the great delay which took place in compelling this collector to return the rolls or pay over the money he had collected, should have sug-

gested to the municipality, under the peculiar wording of the statute, the propriety of pursuing the ordinary remedy, by action against the collector and his sureties, rather than the extraordinary one of issuing the warrant.

It will be observed that under the Consolidated Statute, whilst the county council could enlarge the time for returning the rolls, and could authorize the collector to continue the collection of the unpaid taxes, it was the township municipality that could issue the warrant against the collector and his sureties for not paying over the money within twenty days after the time when the payment ought to have been made. When that was the law, how was the township municipality to know the *time* the collector ought to pay over the money, unless it was that fixed by the county council within the time prescribed by the statute ?

On the whole, I think the verdict should be entered for the plaintiff.

WILSON, J.—The collector should have returned the rolls for 1864 and 1865 by the 14th of December of these respective years, or by some day not later than the first of May thereafter, as the county council might appoint.

The county council did for the roll of 1864 give time for the levy and the collection of the taxes till the 1st of May, 1865.

And the county council did afterwards, for the rolls of both 1864 and 1865, give time for the levy and collection of the taxes "so long as he (the collector) should be recognized by the township."

Notwithstanding the return of the roll, by sec. 103 as amended by 27 Vic. ch 19, sec. 12, is to be not later than the 1st of May, yet by section 104 the county council may by resolution authorize the collector or any person in his stead to continue the levy and collection of the unpaid taxes, in the manner and with the powers provided by law for the general levy and collection of taxes. But this shall

not in any manner invalidate or otherwise affect the liability of the collector or his sureties, nor shall alter or affect the duty of the collector to return his roll.

Whether this levy and collection after the 14th of December or the 1st of May can be effectively made without the possession of the roll by the person who is empowered to collect, may be questioned. But whether it can be made or not without the roll, it does not appear to me it would be illegal, if the council left the roll still with the collector, to finish his work after the 14th of December or the 1st of May, when he was merely empowered to continue his levy, and had not the time extended for returning the roll.

If the return be not made by either of these days the collector and his sureties are guilty of a default, and are to be still answerable for that default, notwithstanding the resolution of the council authorizing the levy being continued.

The last extension of time for the continuation of the levies was, I think, a general extension so long as the township recognized the collector.

The powers for extending the time for return of the roll, or for continuing the levy, were by the Act of 1866 transferred from the county to the township council.

The township council, then, under the Act of 1866, by resolution of the 5th of March, 1867, authorized the treasurer of the township to notify him that if the rolls for 1864 and 1865 were not duly returned by the 11th March the council would take immediate steps to enforce the return, and to demand the rolls from him on the 12th of March, if Moore should not have returned them.

Moore returned the rolls under the resolution of the 5th of March, but not verified. Large defalcations were found against him on examination of his rolls.

By *Township* resolution of April, 1867, setting out these defalcations, and that the collector had failed to return the rolls, with schedules, &c., it was directed that it be an instruction to the treasurer to demand the immediate custody of the said rolls, and of all moneys received by the collector and not paid over, and to report to the council.

And on the 2nd of April the treasurer demanded the taxes collected and not paid over from the collector.

On the 12th of March a demand was made for the rolls by the treasurer, and the collector returned the rolls either before or on or after demand upon him.

On the 2nd of April the treasurer demanded payment from the collector of the unpaid money collected. The money was not paid.

After the long delay permitted by the county council without taking proceedings against the collectors, it would seem only proper, before enforcing by so summary a process the payment of the arrears as section 182 of the Act of 1866 gave to the township, that the council should make a demand upon the collector—who may have believed he was duly employed to continue the collections, even although he may not have been formally employed by resolution to do so—to pay over the amount he had collected, before issuing a warrant against all the property of the collector and his sureties.

Without such a demand and a refusal or neglect to pay, it may be contended, as no specific day had been fixed for payment of the collection by the last general extension of time, that summary process cannot be legally issued.

It is provided by 29-30 Vic. ch. 53, sec. 182, that if a collector refuses or neglects to pay the proper treasurer the sums contained in his roll, the treasurer shall "within twenty days after the time when the payment ought to have been made" issue a warrant.

Here no precise day being fixed for paying over the collections, a demand was required to be made on him to pay over before he could be considered as in default.

The demand on the 2nd of April fixed the time for payment. For the first time properly under the two rolls the collector made default in payment, according to the extended time.

On the 6th of April, 1867, the warrant to sell the goods and lands of the collector and his sureties, for defalcations under both rolls, issued, and was delivered to the sheriff.

The Statute says, "The treasurer shall, *within twenty days* after the time when the payment ought to have been made, issue a warrant." It issued *within twenty days* after the demand on the 2nd of April. Is that the time when the payment ought to have been made?

I think the party would be entitled to a reasonable time after the demand within which to pay. Perhaps three days would be a reasonable time. If so, the warrant on the 6th of April, 1867, is all right, if the warrant is to be issued not later than twenty days from the time of default.

But does the Statute mean that the warrant is to issue only within the twenty days? If so, this warrant may issue the very day after the payment should have been made, and cannot issue after these twenty days have expired. Or does it mean that the warrant shall not be issued for twenty days after the default was made?

In *Rex v. Ireland*, 3 T. R. 512, the words on which the question arose were as follows: "that the prosecutor, for the recovery of such costs, shall, *within ten days* after demand made of the defendant, and refusal of payment, have an attachment granted against the defendant." Only *eight* days had elapsed since the demand.

The Court said, "Though the words of the Statute were '*within ten days*,' they had always been understood to mean that the ten days must elapse before the attachment could be granted; otherwise, instead of the indulgence of the ten days supposed to be offered by the Legislature, the party would be liable to an attachment *immediately* after a demand and refusal." And they refused the motion for an attachment.

"Upon" may mean *before*, or *simultaneously with*, or *after*, as reason and good sense require the interpretation with reference to the context and the subject matter of the enactment: Per Tindal, C. J., in *Regina v. Humphrey*, in Error, 10 A. & E. 370.

It is said, that if a new trial be granted *upon* payment of costs, that means *on condition* of paying the costs.

So as to the payment of a sum *upon* conviction of the offender : *Ibid.* 346, 362.

So also as to amending on payment of costs : *Levy v. Drew*, 5 D. & L. 307.

Paynter v. James, L. R. 2 C. P. 348, is to the same effect. Payment *on* right delivery of the cargo means the payment is to be concurrent with the delivery, and not after the delivery.

In *O'Meara v. Foley*, Ir. L. R., 4 Com. Law 116, it was held that, the words of the C. L. P. Act, judgment might be marked and execution issued "on the fifth day in Term after such verdict, or within fourteen days after such verdict, whichever shall first happen," meant that "within fourteen days" should be construed *upon* the expiration of fourteen days.

Whiteside, C. J., adopting the language of Parke, B., in *Young v. Higgon*, 8 Dowl. 217, "Reduce the question to the case of a single day, and then see what hardships and injustice must ensue," said, "*So I say here.*"

I am of opinion the collector had until the 2nd of April, 1867, within which to pay, the demand on that day determining his right to any further day, and upon the authorities the warrant by way of execution, which issued on the 6th of April, having issued before the twenty days after default to pay had elapsed, was improperly because prematurely issued.

MORRISON, J., concurred with Wilson, J.

Judgment for plaintiff.

PERDUE V. HAYS ET AL.

Action for rent—Pleading.

To an action for rent due on a lease defendant pleaded, that after the lease the plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M., who claimed the rent. *Held*, sufficient, without averring that the conveyance was by deed.

DECLARATION.—That the defendants, by deed dated the 18th of February, 1868, covenanted with the plaintiff to pay to the plaintiff the sum of \$100 on the 1st day of February, 1869, and the sum of \$100 on the 20th day of September, 1870, but did not pay the same.

Plea, on equitable grounds, to that part of the plaintiff's declaration claiming the instalment of rent due on the 1st day of February, 1869; that the said covenant in that part of the declaration mentioned is contained in an indenture of lease of, &c. (describing the land leased) made by the plaintiff to the defendants, to hold for the term of three years from the 20th day of September, 1867, and that the said instalment to which this plea is pleaded is a certain sum reserved as rent under said lease, and therein covenanted to be paid to the plaintiff: that, anterior to the making of the said indenture of lease, the said demised premises were possessed by one George Coulter, now deceased, who in his lifetime, on the 6th day of May, 1867, did grant and convey, by way of mortgage, the said demised premises unto one John A. McCoy in fee simple; that on or about the 17th day of January, 1868, the said George Coulter, in his lifetime, did grant and convey all his right, title, and interest in the said premises to the plaintiff, and that before and at the time the said instalment of rent became due, the moneys for principal and interest, much in excess of the said instalment of rent, were due and payable on said mortgage: that subsequent to the execution of the said indenture of lease to the defendants, to wit, on the 30th day of December, 1868, the said plaintiff did grant and convey by way of mort-

gage in fee simple, unto the said John A. McCoy the said demised premises, to secure a further advance of money thereon: that while the said mortgages, and each of them, was in full force and effect, default was made in payment of principal and interest on them and each of them thereby secured, upon which said mortgages for the default aforesaid proceedings were taken by the said John A. McCoy, which resulted in a decree of foreclosure being made thereon against the said plaintiff in the Court of Chancery before the commencement of this suit, but on which the usual time for redemption had not then expired: that at the time of the commencement of this suit and the giving of the notice hereinafter mentioned, the said principal moneys and interest then due on said mortgage, to a larger sum on each of said mortgages than the said instalment, were and still are unpaid: that while the said John A. McCoy was so seized in fee simple of the said demised premises as aforesaid, and after the defaults aforesaid, and while the said John A. McCoy had the right specially reserved by said mortgages to distrain for arrears of interest then due thereon to an amount greater than the plaintiff's claim, the said John A. McCoy caused notice to be given to the said defendants to pay the said rent, being the moneys mentioned in that part of the declaration to which this plea is pleaded, to him or his attorney, and not to the said plaintiff: that the said John A. McCoy has ever since claimed, and does now claim the same of the defendants, wherefore the defendants are obliged to pay the said money to the said John A. McCoy, and not to the said plaintiff.

There was a second plea, to the other instalment, substantially the same.

Demurrer to the pleas, and joinder.

Moss, for the demurrer. The plaintiff, when he leased, had only the Equity of Redemption, but as against the defendant, his lessee, he had nevertheless the legal reversion by estoppel: *Cameron v. Todd*, 22 U.C.R. 390, 2 E. & A. 434.

The claim made under the first mortgage could form no defence to this action, without payment of the rent in consequence of it; mere liability to the mortgagee is no answer: *Wilton v. Dunn*, 17 Q. B. 294. If it could afford ground for equitable relief it would only be on conditions which cannot be enforced at law. Then as to the second mortgage, which would operate as a conveyance of the reversion, it is not alleged to have been under seal, without which it would be ineffectual. It may have been such an instrument as in equity would be an assignment of the reversion, but not at law. The plea therefore is insufficient. He referred also to *Evans v. Elliott*, 9 A. & E. 342; *Pargeter v. Harris*, 7 Q. B. 708.

C. Robinson, Q. C., contra.—One mortgage was made before the lease, the other after. The effect of each upon the rights of landlord and tenant is fully considered in *Woodfall*, L. & T., 10th ed., 49, 191, 193, 203; and in *Keech v. Hall*, 1 Sm. L. C., 5th ed., 623; and *Moss v. Gallimore*, *Ib.* 560. It may be questioned whether the claim under the first mortgage affords no defence in equity, even without payment, and the plea here is an equitable one. In *Wilton v. Dunn*, 17 Q. B. 300, Lord Campbell said, "The threat of the mortgagee may afford a ground for going into equity for relief." It is unnecessary, however, to determine this, for the second mortgage clearly bars the plaintiff, as being an assignment by him of his reversion. The allegation is that "he did grant and convey by way of mortgage in fee simple," and, under the present system of pleading, this suffices without alleging it to be under seal. To support the plea defendant must prove a deed, but that is matter of evidence only: *Young v. Austen*, L. R. 4 C. P. 556; *Tench v. Swinyard*, 29 U. C. R. 319.

RICHARDS, C. J., delivered the judgment of the Court.

Mr. Moss, on the argument, seemed to concede that unless it was necessary to shew in the plea that the con-

veyance by the plaintiff to McCoy, referred to in the plea, was by deed under seal, the reversion in the lease between the plaintiff and defendant would pass to McCoy, and defendant would be bound by way of estoppel, and consequently that the plaintiff could not sue for the rent accruing due after such transfer to McCoy and notice given to the defendant.

The cases of *Jones v. Todd*, 22 U. C. R. 37, and *Cameron v. Todd*, 22 U. C. R. 390, and the latter case in the Court of Appeal, 2 E. & A. 434, shew that the assignees of a lease made by the mortgagor after the date of the mortgage, will be liable by estoppel for the rent to the assignee of the mortgagor.

Then is it necessary to shew in the plea that the assignment or conveyance of the reversion, which will operate by way of estoppel, from the plaintiff to McCoy, was *under seal*? The averment in the plea is, that the plaintiff *granted* and conveyed, by way of mortgage *in fee simple*, unto McCoy the demised premises.

In *Cruise's Digest*, Vol. IV., pp. 51 and 52, after describing in sec. 34 a grant as the proper mode of transferring incorporeal hereditaments, it is said, "Hence the expression, that advowsons, commons, rents, &c., lie in grant."

Sec. 35.—"As the objects of a grant are not capable of corporeal delivery, it follows that livery of seisin cannot be given upon a grant. But still it has always been held that a grant, accompanied with the attornment of the tenant, was as effectual as a feoffment with livery of seisin; and now the necessity of an attornment is taken away."

Sec. 36.—"Although a feoffment might formerly have been made by parol only, yet a grant could not in general be made without deed; because, as the possession of those things which are the subject matter of a grant could not be transferred by livery, there could be no other evidence of a grant but the deed."

Sec. 39.—“Manors, advowsons, rents, and all other incorporeal hereditaments, may be, and are often conveyed by grant, though a bare right or possibility cannot be granted. Estates in remainder or reversion, consisting in a vested right, may also be conveyed by grant. Thus, Littleton says (sec. 567), if a man lets tenements for a term of years, by force of which lease the lessee is seized, the lessor may grant the reversion, by which the freehold will pass to the grantee, without livery of seisin. And Lord Coke observes on this passage, that, seeing this grant of the reversion must be by deed, the freehold and inheritance do pass thereby, as well as by livery of seisin, if it were in possession.”

It seems like returning to the days of special demurrers to contend that the allegation that a party granted and conveyed the reversion in land or rent in fee simple does not sufficiently shew that it was conveyed by an instrument under seal. The case referred to by Mr. Robinson on the argument of *Young v. Austen*, L. R. 4 C. P. 553, seems an express authority on this point, if it were needed. In that case an agreement to renew a promissory note was pleaded. Bovill, C. J., in giving judgment, said, “Is it necessary that the plea should in terms allege that the agreement was in writing? * * The plea here alleges the agreement to renew as part of the contract. In order to prove that—the law being that the express contract on the face of the bill or note can only be varied by a contemporaneous agreement in writing—the defendant must be prepared at the trial to shew an agreement in writing, or he will fail. The objection that the plea did not allege a writing might have prevailed in the time of special demurrers, as in *Adams v. Wordley*, 1 M. & W. 374. Inasmuch, however, as the allegation in this plea can only be proved by shewing an agreement in writing, it must now be taken to import that it was in writing.” The same doctrine was held to apply to deeds in the Court of Exchequer, in *Thames Haven and Dock and Railway*

Company v. Brymer, 5 Ex. 696, affirmed in Exchequer Chamber, 5 Ex. 711, referred to by Chief Justice Bovill. And he said in conclusion, "Under the present system of pleading, the allegation of the agreement here must be held sufficient, inasmuch as it can only be sustained at the trial by proof that the agreement was in writing."

In this Court, in *Roche v. Patrick*, not reported, and in *Tench v. Swinyard*, 29 U. C. R. 319, the same doctrine is assented to.

We think the substantial part of the plea, that the plaintiff assigned his reversionary interest in the land and rent to McCoy, is a good answer to this action, and our judgment must be for the defendants on this demurrer.

Judgment for the defendants.

IN RE WILLIAM B. HURST, AN INSOLVENT—BROWN, GILLESPIE & CO., CLAIMANTS, APPELLANTS, AND McDERMID, CONTESTANT, RESPONDENT.

Insolvent Act of 1864—Rights of secured creditors.

The Insolvent, in February, 1868, executed a mortgage on lands and an assignment of goods to trustees for the benefit of B. G. & Co., and other creditors named; and in August following he made a voluntary assignment under the Insolvent Act. The trustees after this assignment sold part of the real estate under the power of sale and received part of the proceeds of the goods. B. G. & Co., then claimed to prove against the estate for the balance due to them above what they had received from the trustees.

The official assignee held that they had lost their right, having elected to look to their security instead of bringing it in under sec. 5, subsec. 5 of the Insolvent Act of 1864; and his award was confirmed by the County Judge on appeal.

Held, Morrison, J., dissenting, that the mere fact of the sale did not necessarily exclude them from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced or were recompensed for any loss thereby, they should still be allowed to prove.

THIS was an appeal against a decision of the Judge of the County Court of Brant, affirming an award of A. W. Smith, Esquire, official assignee, who decided against the appellants ranking on the dividend sheet of the insolvent.

The following are the material facts in the case. The questions raised appear in the judgment of the learned Judge, which set out the award of the official assignee.

On the 27th February, 1868, an agreement under seal was entered into between the insolvent, of the first part, and the said Brown, Gillespie & Co., the appellants, and several other named creditors of the insolvent, of the second part; by which—after reciting that the insolvent was indebted to the various creditors mentioned in the sums therein set forth: that said indebtedness in the aggregate amounted to \$6,162.15: that the insolvent had executed a mortgage of said last named date of certain lands therein set forth, and a deed of assignment of certain chattels of said last named date, assigning certain goods and securities therein mentioned to Adam Brown and John C. Watson as joint trustees, for the benefit of the parties thereto of the second part—time was extended to the said insolvent for the payment of the said indebtedness due from him to them, the said creditors, to the times specified in said agreement and in said recited mortgage.

The mortgage referred to in said agreement bore date 27th February, 1868, and was made by the insolvent, of the first part, his wife, to bar her dower, of the second part, and the said Adam Brown and John C. Watson, of the third part. It recited that the insolvent was indebted to the creditors in the agreement mentioned in the respective sums in the said agreement mentioned, and that the said creditors had agreed to extend the times for payment of their respective claims as therein set forth; and it conveyed certain real estate to Brown and Watson in fee simple. It contained a covenant on the part of the insolvent to Brown and Watson to pay the said moneys as in said mortgage and agreement specified, and a stipulation that in the event of the non-payment of the said moneys therein specified when the same should become due, the whole should become payable.

The deed of assignment of chattels referred to in said agreement also bore date 27th February, 1868, and was

made by the insolvent, of the first part, and Adam Brown and John C. Watson, of the second part, reciting that the insolvent was indebted to the creditors in the agreement mentioned in the respective sums in the said agreement mentioned, and the said extension of time, and then conveyed to the said Brown and Watson, as trustees for the benefit of said creditors, a quantity of cordwood and certain promissory notes.

On the 6th day of August, 1868, the insolvent executed in favor of the official assignee of the County of Brant a deed by way of voluntary assignment.

Since the execution of the said deed under the said Insolvent Act, the said Brown and Watson sold a part of the real estate in the said recited mortgage contained to one George Foster, under the power of sale in said recited mortgage, for \$1,396.18 in excess of a certain mortgage thereon.

Before the said assignment to the official assignee the said Brown and Watson received from the insolvent \$2,700 part of the proceeds of said cordwood, which, with \$99.85, also a portion of the proceeds of said chattels so assigned as aforesaid, received by them after the said assignment in insolvency, were applied by the said Brown and Watson towards satisfaction of a certain mortgage, dated 25th of January, 1867, made by the said insolvent and wife, in favor of the said Adam Brown as trustee for the then creditors of William B. Hurst, the insolvent, therein named, namely, Brown, Gillespie & Co. and several other named persons.

The said last mentioned mortgage covered the same property as that mentioned in the mortgage of the 27th February, excepting only an additional lot of land comprised in said last mentioned mortgage.

The affidavit of proof of the appellants, made by Mr. Adam Brown, stated that the insolvent was indebted to them in \$2,007, as appeared by a statement thereto attached, which shewed a balance claimed by appellants of \$1,126.26, and also stated that they held as security for their claim an

interest in a certain mortgage and notes of hand assigned by the insolvent to trustees.

The following is the judgment of the learned Judge of the County Court :—

JONES, Co. J.—This case is brought before me on the appeal of Brown, Gillespie & Co., creditors of the insolvent, who claimed to rank against the estate on the dividend sheet for the balance of their debt as proved against the estate of the insolvent.

The assignee by his award decided against the claim of the appellants, holding that they were not entitled to rank against the estate, and directing that they should pay the opposing creditor his costs in the contestation before the assignee.

The facts of the case and the evidence taken before the assignee are sufficiently set forth in the award. The several objections raised by the opposing creditor to the claim of the appellants, and the grounds on which the assignee in his award disposes of these objections, are as follows :—

1. "The claims of all the creditors under the trust mortgage of 27th February, 1868, should have been proved by Brown and Watson as trustees."

2. "The affidavits to these claims in Lower Canada sworn before a justice of the peace are insufficient."

3. "The affidavits are not sufficiently specific."

4. "That they cannot rank on the estate until the amount is settled for which they are entitled to rank under the Statute."

5. "That they have no right to rank on the estate at all, because they have disposed of some of their securities after the date of insolvency."

6. "That they have not properly accounted for these securities."

"I proceed to treat the fourth and fifth objections, as they strike at the right of Messrs. Brown, Gillespie & Co., to rank on the estate under any circumstances, and if de-

cided against them settle the question so far as I am concerned.

“Subsec. 5 of sec. 5 of the Insolvent Act of 1864, provides that a creditor holding security from the insolvent, or from his estate, shall specify the nature and amount of such security in his claim, and shall therein on his oath put a specified value on such security; and the assignee, under the authority of the creditors, may either consent to the retention of such security by the creditor at such specified value, or may require from such creditor an assignment and delivery of such security at an advance of ten per centum upon such specified value, to be paid by him out of the estate as soon as he has realized such security, in which he shall be bound to the exercise of ordinary diligence; and in either of such cases the difference between the value at which the security is retained or assumed, and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid.”

“Sec. 18 of ch. 18, of 29 Vic. enacts, that ‘upon a secured claim being filed, with a valuation of the security, it shall be the duty of the assignee to procure the authority of the creditors at their first meeting thereafter to consent to the retention of the security of the creditors, or to require from him an assignment and delivery thereof; and if any meeting of creditors takes place without deciding upon the course to be adopted in respect of such security, the assignee shall act in the premises according to his discretion and without delay.’

“The secured creditor is no where required to give up his security and to come in and share with the unsecured creditors. He has the right to proceed to realize on his securities independently of the assignee.

“In the case of *Gordon v. Ross*, 1 U. C. L. J. N. S. 106, Vice-Chancellor Mowat refused an injunction, applied for by an assignee in insolvency, to restrain a secured creditor from proceeding to sell the insolvent's estate under a mortgage, and held that the mortgagee was not obliged to file

a claim, but was at liberty in lieu thereof to exercise the power of sale contained in his mortgage.

“It seems to me to follow, that if the secured creditor proceeds to realize on his securities independently of the assignee, he must be considered to have abandoned his claim on the estate.

“In this case Brown and Watson must be taken to have elected to depend entirely on their securities to make the amount payable to them under the mortgage of the 27th February, 1868, for notwithstanding they had actual notice of the assignment in insolvency they effected the sale to Foster without giving me notice of it, although the equity of redemption sold was vested in me.

“The contention of Brown, Gillespie & Co. is, that a secured creditor has the right to realize on some of his securities, or on the whole of them, and if a balance is still due him then to proceed against the estate for such balance. I do not think this position tenable, for the following reasons :—

“It is against the policy of the Insolvent Act, which evidently intended that an insolvent's estate should be managed and distributed by the assignee for the benefit of the whole of the creditors. It precludes the assignee and the creditors from exercising their option as to whether or not they will take the securities of the secured creditor at a valuation, and it does away with the provision of the Act which provides for the ascertaining of the amount a secured creditor shall be held to represent in voting at meetings of creditors.

“On a careful consideration of the Insolvent Act, I think that the right a secured creditor has to rank on the dividend sheet is confined to those cases where he has the power to surrender all his securities to the assignee as pointed out above.

“As to the first objection, I may remark that the reasoning by which I have attempted to support the position taken by me in reference to the fourth and fifth objections will shew that Messrs. Brown and Watson should have

proved the claims of all the creditors for whom they are trustees. None of these creditors were in a position to surrender the security held for his benefit, while Brown and Watson could have surrendered the whole of the securities and represented all the creditors for whom they are trustees.

"The question as to whether or not the original claims of the different creditors were not merged in the mortgage dated 27th February, was not argued before me. Without expressing any opinion on the point, I merely mention that it no where appears that the mortgage and assignment of chattel property of the 27th February were collateral, or that the remedies on the claims as they originally existed are reserved. Moreover there is an express covenant by the insolvent in the mortgage to pay the aggregate amount of the claims of the several creditors.

"I do not undertake to decide that the original claims were merged in such mortgage, but from the facts stated I think it might be reasonably argued that they are, and if so this would be an additional argument that the claims of the secured creditors should be proved by Brown and Watson.

"There is no necessity for considering the second objection in this case, as Messrs. Brown, Gillespie & Co.'s claim was not sworn to before a justice of the peace. I may remark, however, that I consider justices of the peace are proper authorities before whom affidavits of claims in insolvency may be sworn. Sec. 11 subsec. 5 of the Insolvent Act is not repealed by sec. 25 of the amendment to the Act.

As to the third objection, I think the difficulty suggested might be got over, but my finding on some of the other points renders it unnecessary to consider it. In the view I have taken of this case I have not considered objection number six material to be considered, and therefore do not decide it.

"For the reasons given above, I award that Messrs. Brown, Gillespie & Co. are not entitled to rank on the dividend sheet for any amount whatever; and I further award and direct that they pay to the opposing creditor his costs of this contestation."

I have, as fully as my other duties would permit, considered the several questions raised in this appeal, and am of opinion that the decision of the assignee in his carefully prepared award is correct, for the reasons above stated. The cases referred to by Mr. H. McMahon, in *Fisher on Mortgages*, last ed., p. 352, and *Archbold's New Bankruptcy Law*, 637, I have examined, but they are not in point, as our Statute is so different from the English Act, which does not contain any clause requiring the secured creditor to value his security in proving his claim.

I think it would be quite contrary to the spirit of the insolvent law if a creditor could after his debtor's insolvency dispose of his securities, which may embrace the bulk of the insolvent's estate, without any reference to the assignee, as the appellants have here done, and then prove against the estate for the balance of his claim.

I am of opinion that this appeal should be dismissed, with costs of appeal to be paid by the appellants, and that the award of the assignee be confirmed.

From this judgment the claimants appealed.

The case was first argued in Michaelmas Term, 1869, before MORRISON, J., and WILSON, J., by *Moss* and *H. McMahon*, for the appellants, and *J. A. Boyd*, for the respondent, and the Court differing in opinion a reargument was directed.

It was again argued in Michaelmas Term last.

H. McMahon, for the appellants, cited *Ex parte Nunn*, *Re Nunn* and *Barber*, 1 Rose 322; *Ex parte De Tastet, et al.*, 1 V. & B. 280; *Ex parte Barclay*, *Re Brander*, 1 Glyn & J. 272; *Palmer v. Hendrie*, 27 Beav. 349; *Gowland v. Garbutt*, 13 Grant 584; *Willes v. Levett*, 1 De G. & Sm. 392; *Ex parte Geller*, *Re Sill*, 2 Madd. 266; *Ex parte Rolfe*, 3 M. & A. 311; *Re Bulmer*, *Ex parte Johnson*, 3 De. G. M. & G. 218; *Ex parte Davenport*, 1 M. D. & De. G. 313; *Ex parte Bacon*, 2 Deac. & Ch. 181; *Ex parte Moore*, *Re Huntingdon*, *Ib.* 7; *Ex parte Barnard*, *Re Skinner*, 3 Deac. & Ch. 291; *Ex parte Lackington*, *Re Hamlet*, 3 M. D.

& De. G. 331 ; *Ex parte Glyn et al.*, 1 M. D. & De. G. 25 ; *Ex parte Hunter*, 6 Ves. 94 ; *Re Oxford and Canterbury Hall Co.*, L. R. 8 Eq. 691 ; S. C. L. R. 5 Ch. App. 433 ; *Re Joint Stock Discount Co., Warrant Finance Company's case*, L. R. 5 Ch. App. 86 ; *Stone v. Thomas*, L. R. 5 Ch. App. 223 ; *Kellock's Case, Re Xeres Wine Shipping Co.*, L. R. 3 Ch. App. 777 ; *Robson's Bankrupt Law*, 244-6, 249, 291 ; *Ex parte Bennet*, 2 Atk. 528 ; *Ex parte Hedderly, Re Hicklin*, 2 M. D. & De G. 487 ; *Ex parte Thornton*, 3 De G. & J. 454, 34 L. T. Rep. 55.

J. K. Kerr, Fitch with him, for the respondent, cited *Wolfe v. Vanderzee*, W. N. for 1869, p. 66 ; *Greenwood v. Taylor*, 1 Russ. & M. 185 ; *Gordon v. Ross*, 11 Grant 124.

[*Thomas McMahon* appeared for the assignee, but, on objection taken by counsel for the appellants, the Court refused to hear him.]

MORRISON, J.—The main question raised and argued in this appeal, is whether the appellants are entitled to prove and rank on the dividend sheet for the balance of their debt, they being secured creditors by mortgage on real estate, and since the assignment in insolvency having sold a portion of the mortgaged property; or, in other words, whether having so elected since the insolvency proceedings to look to their security, and not to the insolvent estate, for payment of their debt, they are nevertheless at liberty to rank with the other creditors for their unpaid balance.

The only provisions in our Insolvent Law in terms relating to secured creditors, are contained in subsec. 5, of sec. 5, of the Act of 1864, and the 18th and 19th sections of the amending Act of 1865. Subsec. 5 is isolated and disconnected, and we can only conjecture what the intention of the Legislature was, the Statute not declaring otherwise the position of secured creditors.

I take the Statute to mean that if a secured creditor elects to rank on the insolvent estate, instead of trusting to his security for payment, he must claim as a creditor,

stating on oath the value of his security, and if that value is not objected to he retains the security at such value in satisfaction of so much of his debt, and proves for the balance; or if the creditors think an assignment of the security would be more advantageous to the estate, they are authorized to take the security at an advanced value of ten per cent. on the secured creditor's estimate, and he proves and ranks for the difference.

There can be no doubt that the equity of redemption in the lands these appellants had mortgaged to them, as well as the right to any surplus, after payment of the secured debts, became vested in and belonged to the assignee upon the assignment to him by the insolvent, and it seems to me to be only reasonable that if the appellants did not intend to rely solely upon their securities for the payment of their debts, it became their duty to bring in their securities as they stood at the time the estate of the insolvent vested in the official assignee, and take advantage of the provisions of the subsec. 5, of sec. 5, and have their rights settled in pursuance of that provision, and the 18th and 19th sections of the Act of 1865.

The Legislature never could have intended that secured creditors, after an assignment in insolvency, should deal with their securities as if no insolvency had taken place, realise and sell the property as they may think proper, without reference to the general creditors, and afterwards rank upon the estate for any balance they may claim as uncovered. Such a proceeding is manifestly inconsistent with the whole object and policy of the Insolvent Laws, and, as said by the learned Judge below, quite contrary to their spirit.

To allow a secured creditor, after his debtor had become insolvent and his estate had passed into the hands of the official assignee, to sell and deal with the property embraced in his security, and after such disposition of the property to rank on the estate for any balance he may claim, would obviously leave open a door to great abuse and fraudulent practices, and be most unfair to the general creditors.

Whatever may have been the object of the framers of the Act, the only construction I can put on subsec. 5 is, that it was designed to enable a secured creditor who was not disposed to take his security in discharge of his claim, or deemed it insufficient, to come in and prove for the difference in value between his estimate of it and the amount of his debt, giving an option to the official assignee to take it for the benefit of the creditors, he paying to the secured creditor the advanced value, as provided by the 5th subsection, and permitting him to rank for the balance.

The statutes never intended that the secured creditor was at liberty, after insolvency proceedings, to deal with his securities and dispose of the property as these appellants have done, and then rank on the estate for any alleged balance, and so deprive the general creditors of the option given to them of taking the securities as they stood at the time of the assignment to the official assignee; in my judgment the secured creditor, after the insolvency of his debtor, must elect either to prove on the estate, subject to the provisions of subsec. 5, or to look solely to his security for payment, and having elected by making and proving his claim in the former case, or by disposing of the secured property or any part of it in the latter, he cannot afterwards retract.

I may refer to *Ex parte Downes*, 18 Ves. 290, as bearing on the matter, although the converse of this case. There a mortgagee, on a low valuation of the estate, electing to give up his mortgage, was admitted to prove under a commission of bankruptcy against the mortgagor. The estate being afterwards sold by the assignees for a larger sum, the mortgagee presented a petition praying to be at liberty to withdraw his proof and have the benefit of his mortgage. Lord Eldon said it was dangerous to allow a mortgagee to retract his election after having had the benefit of his proof, and dismissed the petition. So here, it would be most dangerous to allow a mortgagee who had elected to take the benefit of his security, by disposing of the

property on his own terms, to come in and to rank for any deficiency as a general and unsecured creditor.

I fully concur in the view taken by the learned Judge of the County Court, affirming the ably drawn up award of the official assignee.

I have looked at the various cases cited on the argument, but owing to the difference between the English Statutes and our Insolvent Law they do not bear directly on the question, except in this, that they shew the determination and great anxiety of the Courts to shut the door against every proceeding having the slightest tendency to interfere with a fair and equal distribution of the effects of the bankrupt.

I should have regretted if I found authority constraining me to arrive at a different conclusion.

I think the appeal should be dismissed with costs.

WILSON, J.—I have no doubt the mortgagees could have proved on the estate of the insolvent if they had pleased, in which case they must have valued their security and given it up, or have had it otherwise dealt with as the Act directs. They were not, however, compelled or compellable to come in and prove; they might have depended on their securities alone.

A creditor with a mortgage as security on goods or lands, exercising the power of sale he has in the one case, or acting under the power of sale granted to him in the other case, and so disposing of the property he held, may certainly, under some circumstances, be considered to have made his election not to rank on the estate, but to enforce his securities for his own benefit at law.

I do not see, however, why a creditor who has the promissory note, bond, or mortgage of his debtor, should not, if he has got payment from him, after the issuing of the writ of attachment, be at liberty to come in and prove, on bringing in for the general body of creditors the money which he has received. No harm or prejudice can be done

to the estate by the payment and subsequent accounting of it. He should not be permitted to interfere with any dividends that had been paid, or perhaps declared though not paid ; but it would seem unjust to exclude him from participation in the estate on any terms, even though on the condition of paying in all that he had personally got.

I do not allude to the case of a creditor wilfully standing out against the general body of creditors, and pressing his securities, or his remedies, and then for some cause or other abandoning that course and claiming to have the benefit of the arrangement that he had before endeavored to prejudice. I refer to the case of a creditor who has evinced no such disposition, but who has simply collected some security which he held, and against whom a rule is sought to be enforced, by attempting to treat such collection as equivalent to a deliberate election to become no party to the insolvency.

When a creditor deals with the estate so that he is no longer in a position to restore to the debtor the property which was pledged upon payment of the redemption money he cannot take compulsory proceedings against the debtor

Here it is shewn that a part of the property given to the private trustees for creditors was sold under a power of sale, and produced for them \$1,396.18, after paying off a prior mortgage on the property. This prior mortgage, I assume, had been made by Hurst.

If so, these creditors have undoubtedly sold his equity of redemption, and so, it may be said, have prejudiced his estate. Whether they have prejudiced it or not may perhaps be the subject of enquiry : that is, the mere fact of the sale should not exclude them from a share in the general estate after accounting for the value of the estate sold, to be estimated at such sum as may reasonably be fixed on it by the creditors or the assignee.

The payments which the creditors or their trustees received before the assignment in insolvency cannot in any way exclude the creditors from ranking if they please,

though they may have to account for the money received, which is quite another thing.

The whole case then is, whether creditors having claims to the extent of \$6,162.15, less \$2,799.85. (the last sum having been received before the insolvency) leaving at the time of the voluntary assignment \$3,362.30 still due, have lost their right to prove on the estate, by selling since the voluntary assignment property under a power of sale, on which they make for themselves \$1,396.18.

What they have done cannot be to the prejudice of the general body of creditors if the sum they realized, or the sum they are willing to be charged with as the value of Hurst's interest in the property sold, is fully accounted for to the assignee as part of the general fund.

If it were no part of the general fund, no account can be claimed of it : *Cockerell v. Dickens*, 3 Moore, P. C. 98.

Although the creditor has disposed of part of his securities, he is practically, so long as he has dealt fairly with them, in just the same position as if he had put a specified value on them and been allowed to retain them. If the assignee or general creditors could have made no more of them than the secured creditor has done, what benefit could it have been to them to have had an assignment of them ?

I do not think the mere fact of selling or assigning a part of the securities which a creditor has, can of itself, without regard to any other circumstances, be deemed to have been an absolute and deliberate act of election not to rank on the estate. It may be some evidence of it, but not conclusive evidence ; the true facts may be shewn, and the inference of election may be repelled.

Suppose, for instance, the property were chattels of a fluctuating and uncertain value. Is the creditor with a debt of \$10,000 not to sell 100 barrels of flour which he holds in pledge, though the markets are high with the prospect of a fall, or though the article is deteriorating in quality, under the penalty of being excluded from a share in the general estate ; and is a sale so made a conclusive

election not to rank? The result must be, that in such a case the goods will be lost by the delay, and no one will be benefited.

If then there is any case in which a disposition of the securities, or of a part of them, will not estop the creditor from proving, it must in every case be a matter for enquiry whether the creditor has made his election or not. See *Ex parte Turney*, 3 M. D. & D. 576.

Then, again, under the private assignment there are various creditors holding separate claims. Is each one of these creditors excluded from ranking because of the act of the trustee in selling a part of the trust estate?

A creditor holding separate notes of his debtor can prove on or otherwise deal with each one as a separate debt, and what he does as to one will not affect his rights as to the others: *Ex parte Newton*, 6 Jur. 68, S. C. 2 M. D. & D. 422.

By the earlier English bankrupt law no proof was allowed to be made by a creditor who held a security for his debt on the bankrupt's estate. This was afterwards altered. By the English Act of 1869, the creditor having a mortgage may rest on his security, or he may have his security realized under the direction of the Court, with leave to prove for the deficiency; or if he had power at law to sell the property he might realize it by sale, without applying to the Court, and then prove for the deficiency. But if there has been any fraud in the sale, it may be made the subject of inquiry, and if the creditor sells improvidently the trustee may have an action against him for damages. *Ex parte Geller*, 2 Mad. 266, and *Ex parte Rolfe*, 3 M. & A. 311, establish this.

If the creditor proved his whole debt, he, as a general rule, forfeited the benefit of his security.

In some cases the Court would allow the security to be valued and the creditor to prove for the deficiency, when the latter was desirous of voting in the choice of assignees before his security could be realized, and when such a course was not injurious to the interests of the other

creditors : *Robson's Bankrupt Law*, 243 to 257 inclusive, and 257 to 260 inclusive.

An inquiry as to whether the estate has been damnified by the sale of the creditor, or a right of action against him for the damage done by him to the estate by such sale, is surely a full protection to the estate and a sufficient remedy against the creditor, without excluding him from a share of the general fund, while the exclusion insisted on might inflict the most extravagant and unnecessary injury on him.

In my opinion, the creditors who are petitioners here have not, by the mere fact of having made a sale of part of their securities, elected not to rank for their debts. That is a conclusion of fact not warranted by the circumstances which have been laid before us.

The assignee or creditors may still, under the statute, value the securities sold, and if the estate has lost nothing by the sale, or if it have and it can be fully recompensed for any supposed damage suffered, then, after making good such damage to the estate, the creditors now excluded should be allowed, as they are entitled to do, to rank for the amount of their respective debts.

And in my opinion, the award of the assignee and the judgment of the learned Judge of the County Court, both of whom have taken much pains and shewn great ability in the disposal of this question, should be altered to the extent and in the manner I have indicated ; the costs of appeal of both sides to be allowed out of the estate.

RICHARDS, C. J., concurred with Wilson, J.

Appeal allowed.

HUNTER V. OGDEN.

Action by husband for not attending wife during illness—Damages recoverable.

The plaintiff sued defendant for neglecting, as a medical man, to attend upon his wife during child-birth, alleging the contract in one count to be to attend at 3 p.m. on the 12th of April, and in another count to attend when notified. *Held*, that upon the evidence, stated below, a contract and breach of it were shewn, which, with proper amendments as pointed out, would support the declaration ; but *Held*, also, that the plaintiff in this action could not recover for the personal injury and suffering of the wife.

THE declaration contained two counts.

The first count stated, in substance, that in consideration that the plaintiff employed the defendant, as and being a surgeon and medical practitioner, to visit, attend, and deliver the plaintiff's wife of the child with which she was pregnant and during the pains and sickness consequent thereon, for reward to the defendant in that behalf, the defendant promised the plaintiff that he would, as such surgeon and medical practitioner, attend upon her at the dwelling house of the plaintiff, in the City of Toronto, at the hour of three o'clock in the afternoon, to wit of the 12th of April, 1870, being the hour and time at which, according to the premonitory symptoms, the delivery of the child was expected, to deliver her of the child and to give her such professional aid and assistance as might be required. Yet the defendant did not attend upon her at the dwelling house of the plaintiff at three o'clock in the afternoon of the said day, according to his promise, or within a reasonable time thereafter, although the plaintiff's wife was then in pain and labor of childbirth, and process of parturition of the said child, but neglected and refused so to do, whereby she was deprived of and without proper medical aid and assistance during the process of parturition, and suffered protracted and painful labor, and the child died in the protracted labor, and the plaintiff's wife was greatly injured in her health and constitution, and painfully, injuriously, and protractedly affected in body and mind, and has so continued

from thence hitherto. And the plaintiff for a long time, to wit from thence hitherto, has lost and been deprived of the aid and assistance of his wife in his domestic affairs and business, and was obliged to incur and pay a large sum of money, to wit \$100, in and about the delivery of the child, and in and about endeavoring to restore his wife to her wonted health of body and mind.

The second count alleged the promise of the defendant to have been to attend at the dwelling house of the plaintiff to deliver the plaintiff's wife of the child with which she was pregnant, when notified by the plaintiff so to do, on appearance of his wife's labor pains and symptoms of childbirth, and alleging a breach of that promise, although notified by the plaintiff so to do on the appearance of her labor pains and symptoms of childbirth, whereby she was kept without proper medical aid and assistance for a long time, to wit for two hours, in and during the said childbirth, and suffered protracted labor, &c., concluding substantially as in the first count.

The defendant pleaded, 1. That he did not promise as alleged. 2. That he did attend according to the promise in the declaration, and was at all times ready to aid the plaintiff's wife, and the plaintiff dispensed with and did not require the services of defendant. Issue.

The cause was tried before Richards, C. J., at the last fall assizes, at Toronto.

The evidence as to the contract was as follows: The plaintiff, who was examined on the trial, said, "I employed the defendant to attend my wife during her confinement. I first went after him on the 11th of April. I did not mention anything particular about it before that. I was sent for that day to come home, as my wife was ill. I got home about 4:45 p.m. My wife wanted me to go for the doctor. I told her to wait till after 6 p.m. before we could get the doctor. (His office hours were from 8 to 10 a.m. and from 1 to 3 p.m.) I went after six for him; he was not in. I went again, and found him. I stated to him what had happened (*i. e.*, as to the pains my wife was

suffering, flooding, etc.) He told me to go home, he would be up after me shortly. I got home: defendant came about 7:15 p.m. He saw my wife. I don't know what passed between them. He remarked when he came out of the room, there was no progress made yet. [After a good deal of conversation, which he repeated, he continued]. When defendant went into the hall he said he expected she would be confined that night, and if the pains came on that night to let him know and he would come, and if the pains did not come on I was not to come till next morning, and not until they did commence. She had no pains till 10 a.m. of the 12th. I went for defendant about 1:20 p.m., and saw him at his house. I described to him the pains. He said it was not necessary for him to be there "just now," but he would be there by 3 p.m. I said, You know, but my wife is very anxious and wants you to come. He said, Go home, and keep her quiet till 3 o'clock, and he would be there. I did as he directed me. I said to him, Under any circumstances I want you to keep a close eye on her. He said, Don't be afraid, he would be there at 3 o'clock. He did not come at 3; not till 5:15 p.m. I sent for another doctor, and the messenger brought Dr. Hollingshed. When defendant came, I said to him, he had promised to be here at three, and I had called in another doctor. He said, "All right, all right," and he started to go out again. As he turned to go out, I called him back and said, As you have come late you will not leave my wife until the child is born. He turned back to the bed-room: my wife said to him he had promised to be there at three, could he not do any thing to relieve her. He said, No, he did not promise to come at three, but after three, after he left his office. She said to him, Won't you speak to me, whom you have attended so long. He said, with a smile or sneer, all was being done for her that could be done. Dr. Hollingshed got up and offered his chair to defendant, saying, as he was the family physician she would prefer him. Defendant did not offer to take the place. Dr. Hollingshed went over

to defendant, and was talking with him. Defendant seemed not to care to consult with him, and as defendant did not take the chair, Hollingshed took it again. My wife saw defendant going out. I did not dream he intended to leave then. I said to defendant, not to leave till the child was born. He had his hand on the outside door, as if to go out. He came back, and I supposed he would not leave. I went into the dining room soon after, and found he had got into the buggy and was out of sight.

The defendant, who was examined as a witness, denied positively having ever engaged to attend at 3 p. m. on the 12th. He said repeatedly he told the plaintiff he left his house at 3 o'clock to pay his visits through the ward, and that he would call at his house on his way through the ward.

The Chief Justice left it to the Jury to say whether there was such a contract made as was declared on, and they rendered a verdict for the plaintiff for \$500.

In Michaelmas Term last *McMichael* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, on the grounds that the verdict was contrary to law and evidence, and for misdirection of the learned Chief Justice, in holding that there was evidence of an engagement or retainer on the 12th of April, as in the first count mentioned, while the engagement entered into on the 11th of April was no consideration for a new promise made on the day after to be present at a certain specified hour, and so there was no consideration for that promise : that there was no evidence of either contract stated in the first and second counts, or of any breach of them, and the learned Chief Justice should have so told the jury : that the learned Chief Justice misdirected the jury, in telling them to take into consideration the sufferings of the wife, or her subsequent insanity, in estimating the damages : that the damages are excessive : that improper evidence was received by admitting the evidence of her sufferings and insanity ; or why the verdict should not be reduced to nominal damages.

In this Term *McKenzie*, Q. C., shewed cause. There was an agreement made on the 11th of April. The service then rendered was paid for. On the 12th of April another agreement was made. There was either an agreement to attend on the 12th on notice, or a general agreement made on the 11th to attend the plaintiff's wife during her labour, whenever it came on—that is, on notice that the defendant's services were required, and on the 12th he got that notice. The contract was proved, and the damages are right if the plaintiff was entitled to recover for the personal sufferings of the wife, as to which he cited, *Longmeid and Wife v. Holliday*, 6 Ex. 761; *Dengate and Wife v. Gardiner*, 4 M. & W. 6; *Baker v. Bolton*, 1 Camp. 493; *Huxley v. Berg*, 1 Stark. 98; *Wilton v. Webster*, 7 C. & P. 198; *Mayne on Damages*, 11, 12, 282. The damages were not excessive on the evidence given: *Appleton v. Lepper*, 20 C. P. 138; *Berry v. DaCosta*, L. R. 1 C. P. 331; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Campbell et ux. v. Great Western Railway Co.*, 20 C. P. 345.

Harrison, Q. C., and *McMichael*, supported the rule. The second plea was proved as to attending on the plaintiff's wife, for defendant did attend on being notified.

The contract consisted of a general agreement made on the 11th, for defendant to attend, no time being mentioned for the attendance. On the 12th the plaintiff asked defendant to attend, who said he would attend at 3 p.m. There was no consideration for that promise: *Brealey v. Andrew*, 7 A. & E. 108; *Hopkins v. Logan*, 5 M. & W. 141; *Roscorla v. Thomas*, 3 Q. B. 234; *Collins v. Godefroy*, 1 B. & Ad. 950; *Cooke v. Oxley*, 3 T. R. 653. Before the late Medical Act, Ontario, 32 Vic. ch. 45, a medical practitioner might maintain an action on an express contract by his patient to pay the fees and charges: *Veitch v. Russell*, 3 Q. B. 928. Since the Imperial Act, 21–22 Vic. ch. 90, similar to ours in this respect, a registered physician may sue for his fees, although there is no express contract, if he is not prohibited by a by-law of the College of Physicians from suing: *Gibbon v. Budd*, 2 H. & C. 92. The plaintiff

was not entitled to recover for the personal suffering of his wife. He claimed damages for such suffering at the trial and asserted his right to them, and he was allowed to proceed for them on the understanding that if he was found not entitled to them his damages should be reduced to 1s. The cases cited on the other side on this part of the case are really in favour of the defendant. As to when the wife should be joined, see *Harr. C. L. P. A.* sec. 75, note (c); *Com. Dig. Baron and Feme*, V.; *Stone et ux. v. Jackson*, 16 C. B. 199; *Hemstead and Hemstead and wife v. The Phoenix Gas-light and Coke Co.*, 3 H. & C. 745; *Siner and Wife v. The Great Western Railway Co.*, L. R. 3 Ex. 150, S. C. in Exch. Ch. L. R. 4 Ex. 117; *Ripley v. McClure*, 4 Ex. 345; *Levy v. Langridge*, 4 M. & W. 337. There were not two contracts—a general retainer to attend on notice, and an engagement to attend at 3 in the afternoon. The plaintiff must fail on one count or on the other, and in no view of the case can he recover for more than nominal damages. They referred to *Blakemore v. The Bristol and Exeter Railway Co.* 8 E. & B. 1035; *Berry v. DaCosta*, L. R. 1 C. P. 331, 333.

WILSON, J., delivered the judgment of the Court.

We think, from the evidence, that what took place on the 11th of April, as stated by the plaintiff, and which the defendant did not deny, is material to be considered, and from it we infer that the defendant agreed to attend to the plaintiff's wife during her confinement. He had been her physician for years before then, and he had attended to her through illness in November and February before that. The plaintiff was to let defendant know if the pains came on that night, and he would attend; and if they did not come on that night, then the plaintiff was to let him know next morning when they did come on, and he would attend.

At about 1.20 p.m. the next day the plaintiff requested defendant to attend, and he agreed to do so. The time of attending is however in dispute. The plaintiff said three

in the afternoon was the time fixed ; the defendant said that hour was not fixed, but that he was to attend upon the woman sometime in the afternoon after three, in the course of his round through that ward.

If the time be not determined as three o'clock for that afternoon's visit, then it would be in a reasonable time after receiving notice at 1.20 p.m., and after 3 o'clock.

The time he did visit the woman was 5.15 p.m., another medical man having been sent for, and who got there at 4.15 p.m., and who was there when the defendant arrived.

The arrival at 5.15 p.m., if three were not positively fixed as the hour, was probably within a reasonable time after 3 p.m. for the performance of the defendant's promise to attend upon and visit the woman during her confinement.

We think a contract such as we have stated was well proved, and that the second count—if after the promise to attend when notified so to do, on appearance of her labor pains and symptoms of childbirth, the further words were added, "or within a reasonable time thereafter, and adding these words in the breach also—would be in accordance with the promise, which we may call an undisputed promise. If necessary that amendment should now be made.

There was evidence to support the first count, though expressly contradicted by the defendant ; so that in strictness it cannot be said there was no evidence to establish a contract.

We think there was ; but we would find it more satisfactorily such as would support the second count, if it were amended as we have stated it should be, than as supporting the first count ; though we have no doubt on a correct charge the jury found the contract proved as stated in the first count.

Under whichever count the finding can be supported is of little consequence, so long as it is supported.

The next question is, assuming a contract on either count to have been proved, was there a breach of it ?

As we have said, we are inclined to think that an attendance at 5.15 p.m., if the agreement were to attend with a reasonable time after 3 o'clock, would be a performance of that promise. If so, at 5.15 p.m. the defendant was at the house. Then did he while there attend to her as he had engaged to do during her confinement?

Much of the evidence shews he did not; that he was pressed to stay and did not; offended, as was intimated, by Dr. Hollingshed, an eclectic, having been called in about an hour before the defendant's arrival. The defendant says he did not stay because everything was going on well, and it was unnecessary for two to be there; and that he thought the plaintiff wanted him to stay there only to be a spy on Dr. Hollingshed, to see that he did what was right, and he said he would not do so for any man.

It does not appear he told the plaintiff that he declined to stay on this ground, nor does it appear that the defendant said anything of the kind. There was evidence therefore of a breach of the defendant's contract, for the woman was not fully delivered for about half an hour after the defendant left, and he never returned to see her, although she was ill from her confinement for a considerable time afterwards.

Whether her long and severe illness was the result of the defendant's non-performance of his agreement, or whether the child's death can be traced to that cause, is exceedingly doubtful. I am inclined to say, on a perusal of the evidence, that these results were not satisfactorily traced to, or were rightly assigned to that cause; although I think the defendant did not act as one would have supposed a medical man should have acted who had been the medical adviser of the family for so long a time, when the woman was suffering so much, and there was so much anxiety felt by herself and by the others for her, which might have excused the getting of another medical man in such an exigency.

But there is another point which must also be considered—that is, whether the husband can recover in this action for the personal sufferings of his wife,

If he cannot, the damages are to be reduced to a nominal sum.

In *Chitty* on Pleading, 7th ed., 82, it is said: "Where an injury is done to the *person* of the wife *during coverture*, by battery, slander, &c., the wife cannot sue alone in any case; and the husband and wife must join, if the action be brought for the personal suffering or injury of the wife, and in such case the declaration ought to conclude to their damage, and not to that of the husband alone; for the damages will survive to the wife if the husband die before they are recovered:" *Com. Dig.*, Baron and Feme V. W. and notes; *Guy v. Livesey*, Cro. Jac. 501.

But the husband shall sue alone for slander of his wife occasioning special damage: *Com. Dig.* Baron and Feme W.

And if the slander be actionable in itself of the wife, so that she and her husband join in the suit, if special damages be laid, such damages will not be allowed to be given for it: *Dengate and wife v. Gardiner*. 4 M. & W. 6.

The distinction is specially made between the claim of a husband and wife for the personal injury of the wife, and the claim of a husband for his own consequential loss by reason of her injury, in *Stone and wife v. Jackson*, 16 C.B. 199; *Siner and wife v. The Great Western R. W. Co.*, L. R. 3 Ex. 150; *Campbell and wife v. The Great Western R. W. Co.*, 20 C. P. 345, and other cases.

The plaintiff and wife could not have been joined in this action, for it is founded on the contract: *Longmeid and wife v. Holliday*, 6 Ex. 761.

The plaintiff should not therefore have recovered in this suit any damages for the personal injury and suffering of the wife, and as the larger portion by far of the damages given was for the special injury and wrong of the wife, the damages, according to the terms on which the evidence was received, must be reduced to a nominal sum.

The rule will therefore be absolute for reducing the damages to one shilling, and will be discharged as to the residue of what it asks. No costs to either party.

Rule absolute.

DICKSON V. JACQUES ET AL.

Statute of Frauds—Contract not to be performed within a year.

The plaintiff, on the 29th of July, agreed with defendants verbally to enter their service as book-keeper on the 1st of September following, for a year from that day.

Held, a contract not to be performed within a year from the making thereof, and within the Statute of Frauds.

APPEAL from the County Court of the County of York.

The action was brought by the plaintiff for an alleged breach of contract in discharging him before the end of a year, which he claimed to serve under a hiring for a year as a book-keeper.

From the evidence given at the trial for the plaintiff, it appeared that on the 29th of July, 1869, the plaintiff and defendants met, when it was agreed that the plaintiff should enter into the defendants' service as book-keeper, at the rate of \$600 a year, on the 1st of September, for one year from that day; and that on the 1st day of September the plaintiff went into defendants' service under that agreement. It was not reduced to writing. At the end of three months the plaintiff, being paid for that period, was discharged by the defendants.

At the close of the plaintiff's case it was objected that the contract, not being to be performed within a year from the making thereof, and not being in writing, was void by the Statute of Frauds.

The learned Judge allowed the case to proceed, reserving leave to defendants to move to enter a nonsuit.

The jury returned a verdict for the plaintiff, and \$300 damages.

In the following term the defendants' counsel obtained a rule to enter a nonsuit on the leave reserved, or for a new trial for misdirection, &c., which rule was afterwards made absolute to enter a nonsuit, and against that decision this appeal was brought.

M. C. Cameron, Q. C., for the appellant, cited *Beeston v. Collyer*, 4 Bing. 309; *Cawthorne v. Cordrey*, 13 C.B.N.S. 406.

Harrison, Q. C., for the respondents, cited *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; *Bracegirdle v. Heald*, 1 B. & Al. 722; *Dobson v. Collis*, 1 H. & N. 81.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that this appeal should be dismissed.

The case cited by Mr. Harrison, *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20, S. C. 4 Tyr. 606, is a direct authority in favour of the respondent. Lord Lyndhurst, C. B., in giving judgment, says, "The first point arises upon the special counts, under which the plaintiff seeks to recover damages against the defendant, upon a contract to continue him in his service for a year. The question is, at what time that contract was made; for if it was made on the 20th of July, and was for a year's service, to commence on the 24th, it was a contract not to be performed within the year, upon which, by the 4th section of the Statute of Frauds, no action could be maintained, being 'an agreement not to be performed within the space of one year from the making thereof.' (referring to *Bracegirdle v. Heald*, 1 B. & Al. 722.) * * If there was a contract in fact upon the 20th, although by the Statute of Frauds no action can be brought upon it, how can another contract be implied? It is not like the case of a demand for services rendered; it is a claim for damages against the defendant for not continuing the plaintiff for the year, and a contract of hiring for a year must be proved." And the Court there held the defendants were entitled to have the rule for a nonsuit made absolute.

Now here the action is on a special count to recover damages upon a contract, to continue the plaintiff in defendants' service for a year. The plaintiff himself swears that there was only one agreement not reduced to writing, and that that agreement was made on the 29th of July for a year's service, to commence on the 1st of September following. That is clearly a contract not to be performed within the space of one year from the making thereof, and so within the 4th section of the Statute of Frauds; and upon

the authority of the case cited this appeal must be dismissed with costs.

Appeal dismissed.

IN RE WILLIAMS, AN INSOLVENT—RIMMER, GUNN & CO. ET AL. CLAIMANTS, APPELLANTS; HOPE, OPPOSING CREDITOR, RESPONDENT.

Insolvency—Nature of claim—Debt or unliquidated damages.

The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as the equivalent for wheat received by him and made away with.

Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent: that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground: that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages.

Held, also that a claim for compensation as to a certain number of barrels which turned out not to be of the quality agreed for was clearly a claim for unliquidated damages, and could not be proved.

APPEAL from the decision of the Judge of the County Court of the County of Peterborough, affirming the award of the assignee against the claim of the petitioners, Messrs. Rimmer, Gunn & Co., and William Claxton.

The claimants applied to be allowed to rank on the estate of the insolvent, but were refused.

The petition stated that the insolvent, before his flight and insolvency, carried on the business of a miller, in or near the town of Peterborough, and by an agreement between the petitioners and insolvent they agreed to deliver wheat to him at his mill, no certain quantity being mentioned, in consideration that he would deliver to them a certain number of barrels of flour of a certain quality, in proportion to the quantity of wheat delivered to him: that the petitioners delivered to the insolvent a large quantity of wheat, but a large portion of flour which the

insolvent delivered to them was very inferior in quality, and different from what he had agreed to deliver to them, by reason of which they lost a large sum of money : and the insolvent wholly neglected to deliver to the petitioners a large quantity of flour for which wheat had been delivered to him by them, by reason of which they also lost a large sum of money, a correct account of which was duly filed with the assignee, and was filed with the petition : that the claim was objected to by James Hope, a creditor of the estate, to which the petitioners replied : that the assignee heard the parties and made an award against the petitioners, and the learned Judge to whom the same was appealed, affirmed it : that they are dissatisfied with the decision : that the evidence of William Claxton established the amount of loss due to the petitioners for flour not delivered, and for inferior flour which was delivered.

The claim was as follows :—

Mr. David Williams,

To Messrs. Rimmer, Gunn & Co., and Mr. Claxton.	
1869. To 856 barrels extra flour at \$5 . . .	\$4,280.00
“ 90 “ super “ at \$4.25 . . .	382.50
1159 barrels passed fancy instead of extra, damage 25c. per barrel . . .	289.75
Damage on superfine passed as middlings and No. 2.	135.00
	<hr/>
	\$5,087.25
By contra account	112.19
	<hr/>
	\$4,975.06

Peterborough, November 6th, 1867.

The main objections to the proof of the claim were, that the insolvent was not indebted to the claimants for flour as alleged, nor was he indebted to them for the claim on the 1159 barrels, or on the superfine flour passed as middlings and No. 2.

The evidence given before the arbitrator was to the effect, that the agreement between the claimants and insolvent was, that he should grind wheat for them, and

for every four bushels and thirty pounds of fall wheat given to the insolvent, he should deliver to the claimants a barrel of flour guaranteed to pass as extra, and for every four bushels and twenty pounds of spring wheat he should give a barrel of flour guaranteed to stand inspection as superfine. The claimants began sending wheat to be ground, and the insolvent also bought wheat at the mill, and sent Claxton the tickets, and he (Claxton) paid them. Under this agreement the insolvent received $4,116\frac{45}{100}$ bushels of fall wheat, and $1,196\frac{42}{100}$ bushels of spring wheat. The fall wheat should have produced over 914 barrels of extra flour, and the spring wheat 276 barrels of superfine. Of the 914 barrels 49 only were delivered, which passed as fancy, not as extra. Of the 276 barrels, only 186 were delivered, 47 of them passing as fine, not as superfine, leaving due 955 barrels in all. The insolvent was charged in account with the 955 barrels of flour at the prices before stated. Montreal prices were \$5.75 for extra, and \$5.20 for superfine on the 17th of September, 1869, and 50c. a barrel would more than cover freight to Montreal. The flour should have been delivered by the insolvent within fifteen days after the wheat was delivered; he was to deliver as fast as possible. The wheat was delivered to him every day, and the flour should have been delivered about as fast as the wheat went in.

Mr. Claxton also said, the insolvent went away in October; he (Claxton) took possession of the stuff in the mill; there was wheat in it; flour was made from it, and credit for it was given to the insolvent.

It was contended that the claim was for unliquidated damages, and not a debt, and that it could not be proved under the Act.

The assignee awarded as follows: The claim for damages for inferior grade is clearly not a debt, but a claim for unliquidated damages, and cannot be proved against the estate.

As to the claim for flour. The claim is for the value of the goods, and not for the damage sustained by non-

delivery. As the value is unascertained, and would depend altogether on the time at which the flour should have been delivered, which is also an unascertained point, (Mr. Claxton's evidence going to shew that it was to be delivered as fast as possible, and not at any fixed date), and as, moreover, it does not clearly appear that the wheat was ever sold to Williams, and not merely left as an ordinary grist to be ground by him, this part of the claim is therefore also for unliquidated damages, and not a debt, and not provable against the estate. The objections (before stated) were therefore sustained, with costs.

The case was then appealed to the Judge of the County Court. His decision was as follows:—

“This case comes before me on appeal from the award of the assignee, in which he finds against the claimant's right to prove against the estate.

“If the demand is a debt it may be ranked, if for damages it cannot: *Abbott's Insolvent Act*, 1864, p. 49. Part of the claim is made expressly for damages, and the other, and much the larger part, for non-delivery of certain flour.

“I think the assignee came to a correct conclusion on both branches of the case. He seems, by his award, less confident of being right as to the flour than as to the claim for inferior quality of flour.

“In my opinion the claim for flour not delivered by the insolvent is as much a claim for damages as the claim for inferior quality of flour that was delivered.

“The evidence of Mr. Claxton establishes that when the wheat from which the flour was to be made was delivered at the mill occupied by the insolvent, the property in it remained vested in the claimants, and that they so considered it is beyond doubt, for when the insolvent absconded Claxton took possession of the stuff in the mill as the property of the claimants. In fact, the contract between the parties was, that the insolvent should grind the identical wheat delivered for the claimants, and from the proceeds deliver to them a certain amount of flour of a defined quality—in other words, manufacture the wheat for them

on certain terms—which contract the insolvent did not fulfil, and hence the claim for flour is for damages for the breach of the agreement.

“This was a very different kind of contract from another often made with millers, by which the wheat delivered to the miller becomes at once his property, he being only liable or indebted to the original owner of the wheat for a certain quantity of flour of a specified quality, that might be manufactured from the wheat delivered, or from any other wheat. In such a case the wheat delivered would become the property of the miller, and might be taken under an execution against him, or be distrained on for rent, and if the wheat were burned by accident the miller would still be liable for the flour.

“By the arrangement in this case the wheat would not be liable for the debts of the miller, and could not be taken for rent; and if burned by accident the miller would be relieved from the delivery of the flour.

“There are two cases in our Courts in which the difference in the consequence of the two agreements are pointed out and commented on: *Stephenson v. Ranney*, 2 C. P. 196; *Tilt v. Silverthorne*, 11 U. C. R. 619.

“The whole claim is for damages, not for debt, and cannot be proved against the estate. I refer to *Green v. Bicknell*, 8 A. & E. 701; *Sharland v. Spence*, L. R. 2 C. P. 456; *Robertson v. Goss*, L. R. 2 Ex. 396; *In Re Penton*, L. R. 1 Ch. App. 158; *Ex parte Wilmot*, *In Re Thompson*, L. R. 2 Ch. App. 795.”

The questions for the opinion of the Court were, whether the claimants were entitled to rank on the estate for the amount of their claim, or for the portion of it relating to the flour not delivered to them, or for the amount of wheat delivered to the insolvent; and whether the claimants were entitled to have an issue to assess their damages, if the Court should be of opinion their claim was for unliquidated damages. And if the Court should be of opinion the claimants were entitled to prove for their claim, or for any part thereof, then the award of the assignee and the

judgment of the learned Judge affirming the same, should be set aside, in whole or in part, according to the circumstances, and that the claimants be admitted to prove their claim, or such part thereof as the Court might determine they were entitled to prove for. Or if the Court should be of opinion the claimants were not entitled to prove their claim, but that they were entitled to have an issue to fix and ascertain their demand, then that the Court should direct such an issue to be tried, and the claimants be allowed to prove on the estate for the amount so assessed. But if the Court should be of opinion the claimants were not entitled to prove their claim, or any part thereof, or to have an issue to fix and ascertain the amount thereof, then the appeal to be dismissed, with such directions as to costs as to the Court might seem meet.

McMichael, for the claimants. The claim in question is a debt, and not a demand for damages. If *assumpsit* is maintainable, the claim may be proved, though *trover* might also be brought: *Deac.* on Bankruptcy, Vol. 1 p. 372; *Parker v. Norton*, 6 T. R. 699. It is not contended that unliquidated damages were provable; but if the claim is one for which a *quantum meruit* lay it is a proveable debt: *Johnson v. Spiller*, Dougl. 167, in the note; *Ex parte Barton*, De G. 315; *Ex parte Moffatt*, M. D. & De. G. 282; *The South Australian Assurance Co. v. Randell, et al.*, L. R. 3 P. C. 101. The value of the flour can be settled by ascertaining what it was at the time when it should have been delivered. That was done in *Bromley v. Child*, 1 Atk. 259.

Moss and J. K. Kerr, for the contestant. To constitute a provable debt, the sum must be so far ascertained as to be recoverable under a *quantum meruit*. The claim here is for non-delivery of the flour under the agreement. It is the default to deliver that is claimed for, which is a claim for an unascertained amount, and debt would not lie: *Atwood v. Partridge*, 4 Bing. 209; *Parker v. Ince*, 4 H. & N. 53. [MORRISON, J., referred to *Betteley v. Stainsby*, 12 C. B. N. S. 477; *Ex parte Bateman*, 25 L. J.

Bank. 19.] Mesne profits are not provable: *Goodtitle v. North*, Doug. 584. On the same general point he referred to *Ex parte Hunter*, 6 Ves. 94; *Ex parte Moffat*, 1 M. D. & DeG. 282; *Green v. Bicknell*, 8 A. & E. 701. The rule is, that if a jury be required to settle the amount due by the insolvent the claim is not a debt which can be proved on the estate, and such an assessment would be required here: *Woolley v. Smith*, 3 C. B. 610; *In Re Penton*, L. R. 1 Ch. App. 158; *Ex parte Wilmot*, *In Re Thompson*, L. R. 2 Ch. 795; *Johnson v. Skafte* L. R. 4 Q. B. 700; *White v. Corbett*, 1 E. & El. 692; *Boyd v. Robins*, 5 C. B. N. S. 597; *Ex parte Mendel*, 1 DeG. J. & Sm. 330; *Robson on Bankruptcy*, 162, 192. It does not appear when the wheat was delivered to be ground. The insolvent had a reasonable time in which to give the flour; no special day was fixed for delivery, nor any place. The time and place of delivery were therefore uncertain, and the price could not be ascertained without a jury: *Boorman v. Nash*, 9 B. & C., 145; *Ex parte Wilmot*, L. R. 2 Ch. App. 795; *Strick v. DeMattos*, 3 H. & C. 22; *Ex parte Godden*, 1 DeG. J. & Sm. 260.

WILSON, J., delivered the judgment of the Court.

The Dominion Act, 32-33 Vic. ch. 16, both in cases of voluntary and of compulsory liquidation, applies to debtors and in favour of creditors: that is, to those who are commonly spoken of as standing in that relation towards each other; and where money or money's worth can acquit by an ascertained or an easily ascertainable value the amount of the debtor's liability. *Johnson v. Skafte*, L. R. 4 Q. B. 700; *Ex parte Wilmot*, *In re Thompson*, L. R. 2 Ch. App. 795.

The 56th section of the Statute confirms this view, for by it the claims which can be proved are "all *debts* due and payable" at the time of the assignment, or of the issue of the attachment, "and all *debts* due but not then actually payable, subject to rebate of interest."

By sec. 57. "claims upon a contract dependent upon a condition or contingency," may also be proved. The amount of them may be agreed upon between the claim-

ant and the assignee, or the assignee may fix the value by award, and the value so established or agreed upon shall be ranked upon as a debt payable absolutely.

The question then is, whether the claim made, or any part of it, by the claimants is a debt. Were they creditors, and was the insolvent a debtor in respect of the transactions in question? That will depend upon determining what the effect of their dealings was between them.

The agreement was, that the insolvent should grind wheat for the claimants at his mill, and for every specified quantity of so many bushels of wheat, according to its being fall or spring wheat, which were given to him, he should deliver to the claimants a barrel of flour of a certain specified quality. The claimants sent a considerable quantity of wheat to be ground to the insolvent's mill, and he also bought at his mill a certain quantity of wheat for them, giving wheat tickets to the sellers, who were thereupon paid for such wheat by the claimants.

Under this agreement the insolvent became liable to the claimants to deliver to them so many barrels of flour, of which number 955 have never been delivered, while all the wheat from which that flour was to be manufactured has been made away with by the insolvent.

From this statement it appears the claimants never gave up their property in the wheat. They sent it to be ground. It still remained theirs. The insolvent would have been bound to restore it to the claimants on their demand. It was as much their property as the cloth of a customer who takes it to the tailor to have it made into a coat remains his, or the watch of the owner which he takes to be repaired remains his.

The case referred to of *The South Australian Assurance Co. v. Randell*, L. R. 3 P. C. 101, is in point, and *Stephenson v. Ranney*, 2 C. P. 196, is expressly in point. The cases referred to in *Mason v. Great Western R. W. Co.*, lately argued here, may also be referred to on this point. (a)

(a) ante p. 73.

In *The South Australian Assurance Co. v. Randell*, the corn was deposited by farmers with a miller to be stored and used as part of his current consumable stock, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of it on the day of the demand. And it was held that such a transaction was a sale by the farmer to the miller, and was not a bailment of the corn, and entitled the miller to insure it as his own property, and to claim for it as such under his policy. But it was stated, that if the property had been delivered to be returned in its original state, or in an altered form, such transfer would not have been a sale but a bailment: Referring to *Jones on Bailments*, 3rd Ed., 64, 102; 2 *Kent's Com.*, sec. 589, 11th Ed.

The wheat, then, having been delivered to be ground, and to be returned in its altered form by the insolvent to the claimants, the wheat was, and the flour too, if it had been made, would have been, the property of the claimants. The claimants could therefore have made proof on the estate for so much wheat which the insolvent owed to them at the market price. His conversion of it determined the bailment, and enabled the claimants to bring trover, but the claimants could waive the tort and sue in assumpsit for the value of the goods, at their election.

If the wheat, then, were the claimants' property until it was ground, it did not cease to be theirs when it was ground into flour. If the flour were their property when it was made, the conversion of it would confer a cause of action as well as if the wheat had been converted. And as the claimants could waive the tort and maintain an action for goods sold and delivered, it follows that the claimants could prove for the flour in question at its market value when it should have been delivered.

If it be clear the flour was made, the claim is right as it is. If it be doubtful, the claimants should be permitted to

amend their claim by adding a demand in the alternative, for so much wheat.

It is very probable that there is evidence sufficient to sustain the claim for the flour.

The claimants could, we think, have maintained *assumpsit* or debt, alleging that the insolvent was indebted to them "in so many barrels of flour of the value of" &c.: *Earl of Falmouth v. Penrose*, 6 B. & C. 385; or for goods sold and delivered, waiving the tort: *Johnson v. Spiller*, Doug. 167; *Parker v. Norton*, 6 T. R. 695; *Woolley v. Smith*, 3 C. B. 610.

There is nothing uncertain here, more than if the insolvent had converted a horse or any other chattel of the claimants. The quantity of wheat delivered is known to a pound; the number of barrels of flour to be delivered is accurately known. The price is all that remains unsettled. But so it would be equally if goods had been sold without the price being fixed. Their reasonable value can easily be ascertained.

The difference between a sale and a resale is a liquidated demand: *Ex parte Hunter*, 6 Ves. 94. So a contract to replace stock is a debt provable in bankruptcy, for its market value at the time of the breach and of the bankruptcy would be the measure of the damages, "and the amount of such damages would be a demand for a sum certain:" *Betteley v. Stainsby*, 12 C. B. N. S. 477, 497.

On the common *quantum meruit* count the price is unascertained, yet a claim which would support it is provable in bankruptcy, because it is easily ascertainable without the intervention of a jury: *Johnson v. Spiller*, Doug. 167.

We quite agree with the learned Judge of the County Court, that the wheat remained the property of the claimants, though delivered to the insolvent to be ground. But upon that basis we arrive at a different conclusion from that to which he came. We think by reason of that ownership of the wheat they could claim for it as goods sold and delivered, if it had not been ground into flour, treating the conversion as a determination of the bailment,

and so giving to them a cause of action for the conversion, or, at their election, a right on an implied contract to demand the value of it as for goods sold and delivered to the insolvent.

We think also, if the wheat were ground into flour, of which there is probably sufficient *prima facie* evidence, that the same remedy may be pursued with respect to the flour.

The claimants cannot recover in respect of the two items of \$289.75 and \$135.00, as they are purely claims for damages, ascertainable only by a jury. They are not certainly *debts* within the operation of the Statute.

The appeal will therefore be allowed as to the other items of \$4280 and \$382.50, or such other sums in lieu of them as shall be determined to be the value of the flour at the time when its delivery by the insolvent ought to have been made, giving credit for the \$112.19 mentioned in the account. And the claimants may amend their demand as before mentioned, if they desire to do so.

The appeal will be allowed, with costs to the claimants payable out of the estate.

Appeal allowed.

DAVY V. JOHNSON.

Division Court—Fi. Fa. from one Division to be executed in another—
32 Vic., ch. 23, secs. 18, 19.

A declaration against a Division Court bailiff for not levying under an execution alleged that the plaintiff recovered a judgment in the first Division Court of the County, and thereupon sued out an execution directed to defendant as bailiff of the second Division Court, commanding him to make the money out of the goods of defendant in the suit, wheresoever the same might be found; and that there were goods of such defendant within the bailiwick of defendant, out of which he could have levied.

Held, that the count was bad: that the writ was not shewn to be within the Act 32 Vic., ch. 23, secs. 18, 19, for it was not alleged that the *fi. fa.* was to be executed in the defendant's division or near to it, or that the goods were within such division, the defendant's "bailiwick" extending to the whole county.

APPEAL from the County Court of Lennox and Addington.

Declaration—That the plaintiff, on the 15th of March, 1869, at the sittings of the first Division Court of the County of Lennox and Addington, by the judgment of the said Court, recovered against Benjamin S. Loyd the sum of \$40.80, and thereupon the plaintiff, on the 21st day of June, 1869, sued out of the said Court a writ of execution upon the said judgment, directed to the said defendant as bailiff of the second Division Court of the County of Lennox and Addington, whereby the said defendant was commanded that he forthwith make and levy by distress and sale of the goods and chattels of the said Loyd, wheresoever the same might be found (except those things which were by law exempt from seizure) the said amount so recovered, &c., &c., amounting to the sum of \$46.99, and his own fees; and that the said defendant have the said sum of \$46.99 within thirty days after the date of the said execution, and do pay the same to the clerk of the said first Division Court of the County of Lennox and Addington for the plaintiff. And the plaintiff caused the said execution to be delivered to the defendant, as and being the bailiff of the second Division Court of the County of Lennox and Addington, and within the jurisdiction of which said Court the said S. Loyd resided, to be executed; and the said defendant, as such bailiff, then undertook and agreed to execute the said execution according to the exigency thereof; and at the time of the delivery of the said execution to the said bailiff and afterwards, during a reasonable time, and before the return day of the said writ, goods and chattels of the said Loyd were within the bailiwick of the said defendant, and the defendant then had notice thereof, and could and ought to have levied thereout the moneys, costs, and interest mentioned in the said execution, yet the defendant, being such bailiff as aforesaid, did not nor would levy the said money and interest, and made default in the execution and return of the said writ of execution, whereby the plaintiff was delayed in recovering the said money and interest, and is likely to lose the same.

Second plea—That there were not at or after the delivery of the said execution to the defendant, and before the return day thereof, during a reasonable time, any goods and chattels of the said Benjamin S. Loyd within the division for which he, the said defendant, was bailiff, whereof he, the said defendant, could and ought to have levied the moneys, costs, and interest mentioned in the said execution, or any part thereof.

The plaintiff having demurred to this plea, the defendant joined in the demurrer, and gave notice of the following among other exceptions to the declaration:—

1. That it appears by the said declaration that the judgment upon which the said execution issued was recovered in the first Division Court of the County of Lennox and Addington, and the defendant was bailiff of the second Division Court of the said county; but the said declaration does not shew either that there was no bailiff of the Court in which the action was brought, and wherein the said judgment was recovered and execution issued, or that the said execution was required to be executed elsewhere than in the division in which the action was brought, and therefore it does not appear that the plaintiff had any right to have an execution directed to be executed by the defendant, who was bailiff of another Court, or that the defendant was bound to execute the same.

2. It does not appear by the said declaration that the defendant was bailiff of a division in or near to which the said execution was required to be executed, nor is it shewn in what division the same was required to be executed.

3. It does not appear by the said declaration that the said Benjamin S. Loyd had, while the said execution was in force, any goods or chattels in the division for which the defendant was bailiff, and the defendant as such bailiff was not bound to travel beyond the limits of his own division to execute the said writ of execution.

4. Notwithstanding anything that appears by said declaration, the goods and chattels of the said Benjamin

S. Loyd mentioned therein may have been within the first division of the said county, in which the action against Benjamin S. Loyd was brought and judgment recovered, in which case the defendant was not bound to levy out of the said goods and chattels the money mentioned in the said execution.

5. That it does not appear by the said declaration that the said execution was required to be executed in or near to the division for which the defendant was bailiff.

Judgment was given against the declaration and in favour of the defendant on the demurrer, and the plaintiff appealed.

Holmested, for the appellant. The 32 Vic. ch. 33, sec. 18, authorizes the issue of an execution from one Division Court to another, and it is the only section under which it can be done (a). All the things which it is said should have been shewn will be presumed if necessary, and the declaration does in fact shew them. Moreover, if they were alleged they could not be traversed. In an action against the sheriff for a false return, a plea that no such *fi. fa.* was duly sued out as alleged was held bad: *Grantham v. Jarvis*, 6 U. C. R. 511; and in *Jones v. Ruttan*, 12 U. C. R. 202, this case was recognized. The defendant by his demurrer seeks practically to set up the defence that the writ was not regularly issued; he relies on the omission to state facts which if alleged he could not have traversed. When nothing appears to the contrary, jurisdiction and regularity will be presumed: *Barnes v. Keane*, 15 Q. B. 75. [WILSON, J.—That is the question. The respondent, no doubt, will contend that this being an inferior Court there can be no presumption in favor of its jurisdiction.] He cited also *Chrysler v. Serpell*, 10 U. C. R. 647.

Osler, contra. The plea cannot be supported, but the declaration is bad for the exceptions taken. Under the old law, Consol. Stat. U. C. ch. 19, sec. 135, this writ would

(a) See the section set out in the judgment.

be clearly unauthorized. To warrant it the facts required by the 32 Vic. must be alleged, and here they are not, either directly or by reasonable inference. There can be no presumption in favor of jurisdiction or regularity here, for such presumptions are confined to the Superior Courts.

MORRISON, J., delivered the judgment of the Court.

The Division Courts Act, Consol. Stat. U. C. ch. 19, provides, by section 135, that the clerk, at the request of the party, shall issue a fi. fa. to one of the bailiffs of the Court, who, by virtue thereof, shall levy of the goods, &c., of the party against whom the fi. fa. is issued, being within the county within which the Division Court was holden, &c. And, by the 138th section, if such party pays or tenders to the clerk or bailiff of the Division Court out of which the execution issued, before an actual sale of his goods, the amount, the execution shall be superseded, &c.

These two sections shew that the execution must go to the bailiff of the Division Court out of which the fi. fa. issued, for he may levy in any part of the county, and the payment may be made to him.

In the present case the judgment was recovered in the first Division Court, and the fi. fa. issued from that Court directed to the defendant as bailiff of the second Division Court, commanding him to make the amount of the goods of the debtor wheresoever the same might be found, and pay the same to the clerk of the first Division Court. No reason appears for the writ being so issued directed to this defendant, and we have to see whether, under the provisions of the Statute of Ontario, 32 Vic., ch. 23, secs. 18 and 19, such a proceeding is authorized and properly pleaded.

By the 18th section it is provided, that notwithstanding any of the provisions of the Division Courts Act, when there is no bailiff of the Court in which the action is brought, or when any execution, &c., is required to be executed elsewhere than in the division in which the action is brought, it may, in the election of the party, be

executed by the bailiff of the division in or near to which it is required to be executed, or by such other bailiff or person as the Judge or clerk issuing the same shall order, and may for that purpose be transmitted by post or otherwise direct to such bailiff or person. And, by the 19th section, it shall be the duty of such bailiff to execute the execution and make return thereof, &c.

If it can be collected from the declaration that the second Division is the one in or near to that in which the *fi. fa.* was to be executed, we should rather be of opinion that the count might be supported, as we think it sufficiently shews that the plaintiff required and elected to have the *fi. fa.* elsewhere than in the first Division in which the action was brought, as it appears it was sued out of the first Division Court to be executed elsewhere, and by a bailiff of another division.

But what the declaration shews is this—that the writ issued from the first Division Court, directed to the bailiff of the second Division Court, commanding him to levy of the goods of the judgment debtor wheresoever the same might be found, averring that the debtor lived in Division No. 2, and had goods within the bailiwick of the defendant. What the pleader meant by bailiwick does not appear, but we take it that it means territorially the county in which the Division Court of which the defendant was bailiff was situate, and not the limits of such Division Court or near to it, for it is quite clear, under the Division Courts Act, that while the bailiffs are appointed to a particular Division Court to serve and execute all writs, &c., issuing from that Court, their authority extends to the whole county.

The direction to levy on the goods wheresoever they may be found is, we understand, the form of the *fi. fa.* prescribed by the rules made by the Judges under the Division Courts Act to be issued under section 135; and under that section these words may be taken to mean anywhere within the county, but it would have been

better to have expressed the limits of the county. In my opinion, if the *fi. fa.* is one issued and to be executed under the provisions of 32 Vic., ch. 23, sec. 18, by the bailiff of a division other than the bailiff whose duty it is to execute *fi. fas.* under the 135th section of the Act, in such case the direction to such other bailiff should be to levy, &c., within the division, naming it, of which he is bailiff, or near to it; and if directed to another who is not the bailiff of the division in or near to which it is to be executed, it should also appear that such other bailiff or person had been ordered to act by the Judge or clerk; and I think the count is defective in not shewing that the *fi. fa.* was to be executed in the defendant's division or near to it. The bare fact that the debtor resided in the defendant's division is not sufficient. If the count averred or it appeared that the debtor's goods, &c., were within the limits of the defendant's division, or near to it, we might assume it was the division in which it was to be executed, and probably the declaration might have been sustained, but it only avers generally that the debtor had goods within the defendant's bailiwick, which, as we have already said, means the county, and, in our judgment, the duty arising under the 19th section of 32 Vic., ch. 23, is not shewn to have been cast on the defendant. It seems to us that the proper mode of proceeding when a *fi. fa.* issues under the 18th section of that statute, is, that the direction in the writ itself, or by indorsement, should be to the bailiff to levy of the goods, &c., being within his division or near to it.

On the whole, we think the appeal should be dismissed with costs.

Appeal dismissed.

IN RE CONKLIN.

*Assault—Information for—Amendment—Second information for same offence—
Right to have the first disposed of—Mandamus.*

The applicant, C., having appeared to an information charging him with an assault, and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words "falsely imprison." This being refused, H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information, "Case withdrawn by permission of the court, with the view of having a new information laid."

Held, that the complainant could not, even with the magistrate's consent withdraw the charge, the defendant being entitled to have it disposed of.

Held, also, that an information may be amended, but if on oath it must be resworn; and that the amendment might have been made here.

Semble, that the more correct course would have been to go on with the original case, and, under 32-33 Vic. ch. 20, sec. 46, to refrain from adjudicating.

A *mandamus* to hear and determine the first charge, and, if dismissed, to grant a certificate of dismissal, was however refused, for the withdrawal was equivalent to a dismissal; and the magistrate might, under sec. 46, refrain from adjudicating, and if it were dismissed without a hearing on the merits, there would be no certificate.

IN Michaelmas Term last, *Harrison*, Q.C., obtained a rule calling on Louisa Howard, the informant in each of the informations mentioned herein, and Thomas Burns, Esquire, the police magistrate before whom the informations were made and sworn, to shew cause, on the first day of Hilary Term thereafter, why a writ of *mandamus* should not be issued commanding the police magistrate to proceed summarily on the first information, and to hear and determine the offence therein charged, and in the event of his dismissing the same, to make out a certificate under his hand stating the fact of such dismissal, and to deliver such certificate to the said Thomas Conklin, the person against whom the first information was laid—on grounds disclosed in affidavits and papers filed; and why a writ of prohibition should not issue, prohibiting and restraining the said police magistrate from proceeding on the second information by hearing or determining the offence therein charged, being the same offence as that

which is charged in the first information, and between the same parties—on grounds disclosed in the affidavits and papers filed; and why such rule or order as to the costs of this application should not be made as to the Court might seem meet, on grounds disclosed in the affidavits and papers filed; and that in the meantime all proceedings be stayed.

The affidavits and papers filed on making the motion were to the effect following:

The first information was laid on the 26th of November, 1870, by Louisa Howard, as follows:—"That Thomas Conklin did, on the 11th of November, 1870, at the town of St. Catharines, in the county of Lincoln, unlawfully assault and beat this deponent. And deponent prays that the case may be disposed of summarily, according to the statute in such case made and provided."

The second information was laid on the 5th of December, 1870, by the said Louisa Howard, as follows:—"That Thomas Conklin did, on the 11th of November, 1870, at the township of Grantham, in the said county, unlawfully assault, beat, and falsely imprison her, the said Louisa Howard, contrary to the form of the statute in such case made and provided."

Conklin's affidavit stated that on the 30th of November last he was arrested at the city of London, and gave bail for his appearance on the following day, when one Robert Foster, who he was informed was a constable of the county of Lincoln, came with a warrant for his arrest, which warrant was granted on the first information: that he was, on the 1st of December, taken into custody in London, by Foster, and taken to St. Catharines, where he gave bail for his appearance before the police magistrate of St. Catharines on the 5th of December: that he appeared at the hour appointed on the 5th of December, to take his trial, when J. E. Rykert, Esquire, the counsel for Louisa Howard, applied to the magistrate to amend the said information by inserting the words "falsely imprison," which the magistrate refused to do, stating that he had consulted the

County Attorney, and upon his advice he would refuse the amendment, and he considered it better that a new charge should be preferred: that the counsel for Louisa Howard then said he would offer no evidence, when the deponent's counsel asked the magistrate to dismiss [the complaint, to which he said, "It is dismissed:" that deponent's counsel said he would ask for a certificate of dismissal, and would withdraw and prepare one: that after deponent's counsel withdrew the second information was laid, and a warrant issued thereon, and deponent was arrested, and at once brought before the said police magistrate who issued the warrant: that after a short time deponent's counsel appeared, and asked if the first charge was dismissed, to which the magistrate said that although he had used the word dismissed, he meant that it was withdrawn, and after some discussion the magistrate endorsed on the first information as follows,—“Case withdrawn by permission of the Court, with the view of having a new information laid.—THOMAS BURNS, P.M.—December 5th, 1870:” that the police magistrate refuses to hear and determine, or in anywise dismiss or convict deponent upon the first information, and says that the case was withdrawn with his consent, and that a new complaint had been lodged against deponent for the same offence, and that he would hear the last complaint, and have nothing further to do with the former complaint: that the magistrate has been requested to proceed upon the first information, and hear the case on its merits, but declines doing so, and contends that deponent has no right to be heard, and that he will not further adjudicate upon it, although deponent appeared and offered to plead not guilty, and proceed with the trial thereof: that the second information was for the same offence as the first information was laid for, and both the magistrate and the counsel for Louisa Howard have stated so: that unless the first charge is disposed of in the manner requested the deponent's remedy at law against the parties prosecuting will be barred, and as he has been improperly put to great expense, inconvenience, and loss, the present

action of the magistrate prevents deponent seeking a remedy: that he is innocent of the charge preferred against him.

Mr. Miller's affidavit merely confirmed the previous one in some respects.

In this term, *Rolland McDonald*, Q.C., shewed cause. Conklin did not plead to the first information. He pleaded not guilty to the second one, and also that the first information had been dismissed. The rule does not ask that the magistrate be ordered to grant a certificate, but to try the first information. The prosecutor never wanted to withdraw the charge on the first information, but to amend it; and an amendment of it might have been made: 1 *Ch. Cr. L.* 268. By the Dominion Act of 1869, ch. 20, secs. 43, 44, 45, 46, the magistrate might have sent the case to a higher Court. The facts shewed the case to have been a more flagrant one than the first charge expressed, and it was feared the defendant would plead not guilty to it, and so escape punishment for the more serious offence.

Harrison, Q.C., supported the rule. There is no difference between the case of the defendant pleading and that of his not pleading to the charge. If the party appear to take his trial, and the charge or information be withdrawn, that is equivalent to a hearing and dismissal, and a certificate should be given: *Tunncliffe v. Tedd*, 5 C. B. 553; *Vaughton, Appellant, and Bradshaw, Respondent*, 9 C. B. N. S. 103; *Regina v. Ebrington*, 1 B. & S. 688; *Hancock v. Soames*, 1 El. & El. 795.

WILSON, J., delivered the judgment of the Court.

In *Tunncliffe v. Tedd*, 5 C. B. 553, the plaintiff brought trespass for assault and battery. The defendant proved that the alleged trespasses amounted to no more than a common assault and battery, within the meaning of the Act, that the plaintiff made a complaint against defendant for the trespass, and that defendant was brought before two Justices of the Peace, and that they dismissed the

complaint on the hearing thereof, on the ground that the trespasses were not proved, and that they did then forthwith make out a certificate of such dismissal, and deliver it to the defendant, &c. The plaintiff replied that the Justices did not dismiss the complaint on the hearing thereof on the ground that the trespasses were not proved. The facts were, that when the charge was called on before the magistrates the defendant pleaded not guilty, and the plaintiff declined to call witnesses, observing that he should go no further with the information, but would bring an action against the defendant. The defendant wished to go on with the case, saying he had brought his witnesses. He then applied for a certificate under the statute. The magistrates gave the following certificate: "We deemed the offence not proved, inasmuch as the said complainant did not offer any evidence in support of the information; and have accordingly dismissed the said complaint. It was held that the defendant having appeared to the information and pleaded to it, the magistrates were bound to determine it; the prosecutor having once put the law in motion, could not withdraw at his option; the complainant having declined to go any further with the prosecution, that was a hearing, and the magistrates were right in dismissing the case; should it turn out that the complainant has sustained a grievous injury, a remedy is provided, not at the option of the complainant, but at the discretion of the magistrates.

In *Vaughton*, appellant, and *Bradshaw*, respondent, 9 C. B. N. S. 103, an information was laid for an assault under the statute; a summons issued upon it, and was served on the defendant. Before the day fixed for the hearing, the plaintiff served a notice on the defendant not to attend, and a notice on the magistrates' clerk that *he* (the plaintiff, as I understand,) should not attend. The defendant attended and claimed to have the information dismissed, and a certificate of dismissal granted, notwithstanding the plaintiff's absence. *Held*, that the magistrates were warranted in granting such a certificate; and that the

certificate was a bar to the action, which the plaintiff afterwards brought against the defendant in the County Court for the assault. It was carried by appeal to the Common Pleas. *Held*, on the authority of the preceding case, that the information is the commencement of a criminal proceeding, analogous to an indictment: that the summons is the act of the magistrate on behalf of the public: that the party who begins a criminal proceeding cannot withdraw from it leaving it pending, but that the party charged has the right to force it on to a conclusion; and if, at the time for concluding the case, the informant offers no evidence in support of his charge, it ought to be dismissed, and such dismissal is a hearing; and that there was no distinction between the case of a plea having been pleaded and no plea put in, so long as the defendant was present to answer the charge.

In *Regina v. Ebrington*, 1 B. & S. 688, it was held that a certificate of dismissal given by magistrates under this statute, on a charge of assault and battery, was a defence to an indictment founded on the same facts charging an assault and battery accompanied by malicious cutting and wounding, so as to cause grievous or actual bodily harm. *Regina v. Walker*, 2 M. & Rob. 446, was referred to in that case, as shewing that a former conviction by magistrates is a bar to an indictment for a felonious stabbing; and *Re Thompson*, 6 H. & N. 193, S. C. 6 Jur. N. S. 1247, as shewing that such a certificate is a bar to an indictment for an assault with intent to commit a rape.

The Dominion Act, 32-33 Vic. ch. 20, sec. 45, enacts that the certificate of a dismissal of a complaint for assault and battery, or that the party has been convicted and has paid the amount adjudged to be paid, or has suffered the imprisonment awarded, shall be a release from all further or other proceedings, civil or criminal, for the same cause.

We are of opinion, in deference to the adjudged cases, that the party complaining could not withdraw from the charge she had made, and we think the consent of the

magistrate could not deprive the defendant of the right to have that charge disposed of. *

The magistrate's discretion is to be exercised upon his own view of the case when he investigates it, under sec. 46 of the Act, which enacts, "That in case the justice finds the assault or battery complained of to have been accompanied by an attempt to commit felony, or is of opinion the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same."

The fact that the defendant pleads guilty to the charge cannot deprive the magistrate of the discretion which he undoubtedly has, of saying whether he shall or shall not *adjudicate thereon*, if in his opinion he ought not to do so. The adjudication means the magistrate's final judgment or sentence to be pronounced.

All he has to do in any case, whether the defendant confess or deny the charge, is to determine whether he shall or shall not adjudicate upon it. If he adjudicate, the defendant will be entitled to the certificate; and if he do not adjudicate there will be no certificate, and so there will be no bar to any subsequent proceedings: *Hartley v. Hindmarsh*, L. R. 1 C. P. 553; *Regina v. Ebrington*, 1 B. & S. 688.

The defendant was entitled to have the first information disposed of in some way or other.

We find a difficulty in saying that there was a hearing, when the magistrate said he would not hear or try the case. The party charged was there to be heard. The complainant was there; and withdrew the information, with the magistrate's consent, the magistrate saying he would not hear it.

The defendant himself says there was no hearing, and he asks now that the magistrate shall be compelled to hear it.

We do not see anything which decides that a magistrate

may amend an information or complaint. We think he must have such a power. The complainant would however have, when it was on oath, to swear to it again.

The indictment could not be amended at common law, being founded on the oath of the Grand Jury, without their consent. But a criminal information, being the mere allegation of the officer who files it, may be amended: 1 *Ch. Cr. L.* 297, 298, 868. The Quarter Sessions can, however, at common law, quash an indictment before plea: *Regina v. Wilson*, 14 *L. J. Mag. Cas.* 3.

What was done in this case was to restate the charge in a second information, in the same manner and form as it would have been in the first one if it had been amended.

If Justices hear the case, but decline to conclude it and dismiss it, as they should have done, they will be ordered to hear it: *Rex v. Tod*, *Str.* 531. So if they refuse to hear the whole case, and dismiss the summons, they will be ordered to hear it: *Rex v. The Justices of Cumberland*, 4 *A. & E.* 695. But if the Justices, on their own discretion, refuse to hear a complaint which is the subject of an indictment, the Court will not compel them to go on: *Regina v. Higham*, 14 *Q. B.* 396.

We think there has been no hearing of the first information, nor has there been any amendment of it; and the defendant has the right to get rid of it in some form or other.

We do not see why it may not be dismissed without a hearing, and a new information laid on a proper case.

Suppose the first information defective, and it was necessary to amend it, is it impossible to amend it, and must the party be tried upon it, when the conviction made on it would be abortive, or must the case be dismissed, and the party get a certificate as a protection against any other charge founded on the same facts?

We think an amendment may be made. It would be useless and mischievous when the defect was pointed out to persist in proceeding further, when the whole must end without effect; or if the case be dismissed on that ground,

then, as there had been no hearing "upon the merits," the person charged would not be entitled to a certificate, and there would be no bar to a second enquiry on a new information. It is not required the information should be under oath, or even in writing, unless the statute makes it necessary to be so. If the information were verbal, when it might be so made, what objection could there be to an amendment? And the same principle applies to written or sworn informations as well as to verbal ones.

The reason why the complainant is prevented from withdrawing the charge before the magistrate is, that he has made it a public matter, and that the person charged has the right to have it tried, and because also the complainant has made his election to have the case so disposed of, from which he cannot withdraw. Here the complainant does in effect withdraw her case from the magistrate. She does not want him to dispose of it, and on the full statement of what her complaint is he cannot dispose of it under the statute. And he consents, so far as he can consent, to that being done.

Suppose, in the matter of *Thompson's* case, 6 H. & N. 193, the prosecutrix had desired, before the hearing on the common assault was entered upon, to abandon that charge, and to lay a distinct information for the felony, and the magistrate had assented to it, would the court have compelled the magistrate to hear the charge of assault? We think it would not, although I have no doubt, if the second charge were laid, the Court would oblige the magistrate to dismiss the first charge.

We do not see what can be gained here by compelling the magistrate to hear the first charge, for he may, if he please, abstain from adjudicating on it under the 46th section; and if he dismiss the charge without a hearing on the merits, it is plain the defendant gains nothing, for he can get no certificate.

In our opinion the more correct course in such a case as the present,—where the magistrate cannot himself finally dispose of the whole charge, and it is not intended that

he should, and he does not himself intend to do so—would be to go on with the original case, and under the 46th section, if the case be within it, to abstain from adjudicating on it, in which case the matter will be disposed of before the proper tribunal.

This answers all the purpose of laying another information upon facts which must of necessity preclude him from trying the charge.

But if the case be one which it is desired the magistrate should himself dispose of finally, and if the information be defective or does not state the case accurately, then we think the information may be amended, on being resworn if the original were under oath. This saves the necessity of preparing a new information.

But if a new information be drawn, stating the former case more correctly, equivalent to a mere amendment, and not ousting the magistrate of his jurisdiction to try it, and there has been no hearing on the merits on the charge as first laid, or stating a case founded on the like facts, which ousts the magistrate of his jurisdiction to try it, and there has been no hearing on the merits of the first charge, we do not think the court will compel the magistrate to hear the charge as at first laid, if he has acted in good faith.

We think, however, in the case of a new information, he would be required to dismiss the first complaint; and such a dismissal of it would not in our opinion be a hearing on the merits to entitle the defendant to a certificate.

It appears from the facts stated here that the first information has in effect been dismissed, for a withdrawal of a charge is equivalent to a dismissal. The writ cannot therefore be granted as prayed for, that the magistrate shall “proceed summarily on the first information, and hear and determine the offence therein charged.”

If the writ had gone, we could not have directed the magistrate what he should do with respect to the granting or refusing of a certificate. That would be assuming he would not act correctly, and the Court never acts on such an assumption in awarding the writ.

The defendant has pleaded to the new information, and as we think there has been no wrong really done or intended to be done, we shall not interfere, although the proceeding has not been very formally pursued.

The rule will therefore be discharged, with costs to be paid by the applicant.

Rule discharged.

THE PORT WHITBY AND PORT PERRY RAILWAY COMPANY
v. JONES.

R. W. Co—Action for calls—Colorable subscription.

Declaration against defendant as a shareholder in a Railway Company for calls on stock. Plea, that by the plaintiffs' charter it was provided that so soon as \$100,000 stock should be taken, and ten per cent. thereon paid into a chartered bank, the Provisional Directors might call a general meeting, and the shareholders who had paid such ten per cent. should elect directors and organize the company: that one D. acting in collusion with the Provisional Directors, to enable them to make a colorable compliance with the Act, agreed to and did enter his name as a subscriber for \$30,000 stock, and to pay \$3,000 thereon, and it was agreed that he should not be called on for any further payment on said stock, and that any payment he might colorably make should be restored to him by means of a contract for building a railway for the plaintiffs, which the Provisional Directors then agreed to give him on such terms as would yield a large profit: that the said subscription was not *bonâ fide*, but in fraud of the Act; and before \$100,000 stock had been taken, exclusive of such fraudulent subscription, the Provisional Directors called a meeting, at which D. was present and assumed to rate as a shareholder, and chose directors, who made the alleged calls; wherefore the said company has never been legally organized, and the said calls were not authorized.

Held, no defence, for D. could not dispute his being a shareholder, and the alleged agreement with him being contrary to the statute could not operate.

DECLARATION :—That the defendant is the holder of forty shares in the said company, and is as such shareholder indebted to the said company in \$800, in respect of four several calls of \$5 each upon each of the said shares, whereby an action hath accrued to the said company, by virtue of the Railway Act, and also of the statute of Ontario 31 Vic. ch. 42, intituled "an Act to incorporate the Port Whitby and

Port Perry Railway Company," to demand and have of and from the defendants the sum of \$800.

Plea :—That the plaintiffs were incorporated by an Act of the Legislature of the Province of Ontario, passed in the thirty-first year of the reign of Her Majesty Queen Victoria, and chaptered 42, and by the said Act it was, amongst other things, provided and enacted, that when and so soon as shares to the amount of \$100,000 in the capital stock of the plaintiffs should be taken, and ten per cent. thereon paid into one of the chartered banks of the said Province, the Provisional Directors of the said company might, upon giving a certain notice thereby prescribed, call a general meeting of the shareholders, and that the shareholders who had then paid ten per centum on the amount of the subscribed shares, should proceed to elect directors and to organize the said company. And the defendant says that one D., acting in collusion with the Provisional Directors of the said company, to enable them to make a colorable compliance with the provisions of the said Act, agreed to and did in fact enter his name in the stock book of the said company as a subscriber for stock to the amount of \$30,000, and to pay ten per centum thereon, being the sum of \$3,000; and it was agreed by and between the said D. and the said Provisional Directors that the said D. should not be called on to make any further payment in respect of the said stock, and that any payment which he might colorably make in respect of such subscription should be restored to him by and through the means of a contract for the building of a line of railway for the plaintiffs, which the said provisional Directors then, and as a part of the said collusive agreement, agreed to give to the said D. upon such terms as would ensure the said D. a very large profit, and at a rate far exceeding that for which other persons could have been procured to build the said line of railway. And the said subscription by the said D. was not *bonâ fide*, but was merely colorable, and was procured by the said Provisional Directors to be made in fraud of the true intent of the said statute, and would

never have been made by the said D., as the said Provisional Directors well knew, but for the said contract having been agreed to be given to the said D. as heretofore mentioned. And before stock to the amount of \$100,000 had been taken or \$10,000 paid into one of the chartered banks of the said Province (exclusive of the said fraudulent and collusive subscription and payment of the said D.) the said provisional directors assumed to call a meeting of shareholders, at which the said D. was present, and assumed to rate as a *bonâ fide* shareholder, and certain persons were chosen directors of the said company at such meeting, and the said company was falsely and wrongfully alleged by the said provisional directors to be duly organized, and the said persons so alleged to have been chosen as directors as afore-said made the said alleged calls; wherefore the said company never has been legally organized, and the said alleged calls were not made by any persons competent or authorized to make the same, and the said plaintiffs are not entitled to demand or have from the defendant any sum whatever.

Demurrer, on the grounds :—1. According to the facts stated in the said plea, D. is liable to the plaintiffs for the amount of stock subscribed by him, and even if he were not so liable that is no reason why defendant should escape liability. 2. Defendant by said plea admits a subscription for shares as alleged in the declaration, and it contains no averment that defendant at any time after his discovery of the alleged fraud disaffirmed liability to the plaintiffs. 3. The plaintiffs have power to make calls, whether organized by the election of directors or not, and said plea is at best a plea that the directors of the plaintiffs were not duly appointed or elected, and this is no defence.

Harrison, Q. C., for the demurrer, cited *The Waterford, &c., R. W. Co., v. Dalbiac*, 6 Ex. 443; *The Howbeach Coal Co., (Limited) v. Teague*, 5 H. & N. 151; *The London and Continental Assurance Society. v. Redgrave*, 4 C. B. N. S. 524; *The Ornamental Pyrographic Woodwork Co. v. Brown*

2 H. & C. 63; *North Stafford Steel, &c. Co. v. Ward*, L. R. 3 Ex. 172; *The Cromford and High Peak R. W. Co. v. Lacey*, 3 Y. & J. 80; *South Eastern R. W. Co. v. Hebblewhite*, 12 A. & E. 497; *Stor. Eq. Jur.*, secs. 293 *et seq.*; *Preston v. The Grand Collier Dock Co.*, 2 R. W. Cas. 354; *The Thames Haven Dock and R. W. Co. v. Hall*, 3 R. W. Cas., 441.

Moss, contra.

MORRISON, J.—We are of opinion that our judgment should be for the plaintiffs on the demurrer to the plea.

The defendant relies, in answer to the action, not upon the bare fact that shares to the amount of \$100,000 were not taken, and \$10 per centum paid thereon, to enable the provisional directors to call a meeting of the subscribers for stock and elect directors, but that a certain amount of the stock taken was not subscribed for within the meaning of the Acts, and so the directors elected were not legally appointed, and had no authority to make the calls sued for; the defendant's contention being, that although he is a stockholder himself, the person named in the plea was not a stockholder to the amount he subscribed for, and without his being so the company could not be legally organized, and the calls made.

The plaintiffs are incorporated under the Statute of Ontario 31 Vic. ch. 42, and certain persons therein named are constituted provisional directors, who are to hold office until other directors shall be appointed; the provisional directors to open stock books, and procure subscriptions for the undertaking, &c. And by the seventh section, when and so soon as shares to the amount of \$100,000 shall be taken, and \$10 per cent. paid thereon into one of the chartered banks, and which said amount shall not be withdrawn except for the purpose of the railway, the provisional directors shall call a meeting of the subscribers for stock for the purpose of electing directors, &c., and the persons elected shall constitute a board of directors. And by the fourteenth section the directors are authorized to make calls.

Now it appears by the plea that \$100,000 in the capital stock was taken and subscribed for, and the ten per cent. paid thereon ; but it is alleged that \$30,000 of such stock, and the ten per cent paid thereon, was taken and paid by one D. upon an agreement between the provisional directors and D. that the latter should not be called upon to make any further payments in respect of such \$30,000 stock, and that any payment which he might make in respect of his subscription for that stock should be restored to him through the means of a contract for the building of a line of railway for the plaintiffs, and which contract the provisional directors agreed to give to D. upon terms that would insure to him a large profit, and at a rate exceeding the value of the work ; and that for these reasons the subscription by D. was not *bonâ fide*, but in fraud of the true intent of the Statute. The plea further shews that a meeting was called by the provisional directors, under the seventh section of the special Act, to elect directors : that D. was present thereat and assumed to act as a shareholder ; that directors were chosen, and that such directors made the calls sued for.

Now it seems to us the first question to be determined is, was D. a shareholder and entitled to vote at the election. of directors, for if he was the directors were regularly elected and competent to make the calls. In our opinion he was. He took and subscribed for the \$30,000 stock He paid the ten per cent. thereon, and which money we must assume was paid into a bank, and could not be withdrawn except for the purpose of the railway, as provided by the special Act. He also attended the meeting of stockholders, and acted as such. It therefore could not lie in his mouth to say that he did not incur all the liabilities of a shareholder, either to the plaintiffs or to the creditors of the company.

Under the fourteenth section of the special Act "all persons subscribing to the capital stock of the said company shall be considered proprietors and partners in the same." Nothing is shewn in the plea to exonerate D.

from his responsibility as a shareholder, but it is alleged that between D. and the provisional directors an agreement was made that D. was not to be called on to make any further payment, and that any payment he might make on his stock would be refunded by means of the profitable contract referred to. The provisional directors had no authority to make any such agreement or arrangement, and if made it could not operate against the provisions of the statutes. This is not the case of D. contending that he is not a shareholder, or that he is exonerated from paying calls.

Under the heading "Calls" in the Railway Act, Consol-Stat. C. ch. 66, and which is incorporated with the special Act, by the 48th section the directors are authorized to make calls upon the shareholders; and by the 50th section every shareholder shall be liable to pay the amount of such calls; and by the 19th subsec. of sec. 7, the word shareholder shall mean every subscriber to stock in the undertaking; and by the 80th section each shareholder shall be individually liable to the creditors of the company to the amount of his unpaid stock. And we take it, under these provisions, every shareholder or person subscribing for stock renders himself liable to calls; nor had the provisional directors any authority to agree or undertake to give D. the contract set out in the plea, for under the heading "President and Directors, their Election and Duties," in the Railway Act, which is also incorporated with the special Act, the 46th section provides that no contracts for works of construction of railways, &c., shall be entered into until after tenders for such works shall have been invited by public notice for at least four weeks in some newspaper, &c., a provision evidently meant to meet any such improper or fraudulent arrangement as here complained of. And by the sixth section of the special Act the powers of the provisional directors are the same, and subject to the like restrictions, as the elective directors upon their being elected would under the provisions of the Railway Act be invested with or subject to

respectively. So that, irrespective of other considerations, the provisional directors had no authority to make any such arrangement as is set out in the plea, and such an agreement would have no force or be binding on the Company; and although such an agreement might be a ground for the company, if they thought proper, to take steps to annul the subscription for stock made by D., yet as he is allowed to remain as a shareholder he is entitled to all the rights and subject to all the liabilities of a shareholder.

On the whole, we are of opinion that as it appears that D. took and subscribed for \$30,000 stock, and paid the ten per cent. thereon, he became a shareholder to that extent, and as including that stock the full amount required by the seventh section was taken, that the provisional directors were authorized to organize the company; and a board of directors being elected, and the calls authorized by them to be made, the defendant became liable to pay therefor, and that the matter appearing in this plea affords no defence in this action.

Judgment for plaintiffs.

WOODHOUSE v. THE PROVINCIAL INSURANCE COMPANY.

Marine policy—Unseaworthiness—Cause of loss.

Action on a policy on a vessel, alleging a total loss. Plea, that the plaintiff knowingly and wrongfully sent the vessel from the port of Toronto in an unseaworthy state, and permitted her to remain on the lake in such state, and without being properly equipped, and that by reason of the premises only the vessel was wrecked and lost.

Held, that the plea was not proved by shewing that the vessel was unseaworthy when she was wrecked, unless such unseaworthiness was the immediate cause of the loss.

DECLARATION upon a marine policy upon the body, tackle, apparel, and other furniture of the scow "Lord Nelson," classed B. I., insured from the 31st of August, to the 30th of November, 1868, with permission to navigate the waters, bays, harbors, &c., of Lake Ontario, against adventures and perils of the lakes, rivers, canals,

fires, and jettisons that should come to the damage of said vessel, or any part thereof, excepting all perils, losses, or misfortunes arising from or caused by the following or other legally excluded causes: for damage from, &c., or from the want of ordinary care and skill in loading and stowing the cargo of said vessel, from rottenness, inherent defects, and other unseaworthiness, &c. Averment, that the vessel was wholly lost; and that said loss did not occur in consequence of any perils, losses, or misfortunes within the exceptions, &c.

Plea:—That while the policy was in force the vessel was in the port of Toronto in an unsound and unseaworthy state, and being so the plaintiff knowingly, wilfully, wrongfully, and improperly sent the said vessel into the said lake, from the said port, in an unseaworthy state, and when she was not in a fit and proper condition safely to go out upon the said lake, and at a time when it was dangerous for the vessel to go out in the state and condition in which she then was; and the plaintiff wrongfully and improperly caused or permitted the vessel to be in and near the shore on the said lake for a great length of time in the state and condition aforesaid, and without being properly equipped, and without sufficient sails and rigging, and otherwise in an unsound and unseaworthy state for the said voyage; and by reason of the said premises only the said vessel was wrecked and wholly lost, as in the declaration mentioned.

Third plea:—That the vessel was lost not by the perils insured against, but by and in consequence of the rottenness, inherent defects, and unseaworthiness of the vessel.

Fourth plea:—That the vessel was not lost as alleged, but was lost through the wilful neglect and misconduct of the plaintiff, his servants or agents.

Issue was taken on all the pleas.

At the trial before Hagarty, C. J. C. P., at the spring assizes, 1870, the following facts appeared:—

From the testimony of the master of the vessel, who had been on board of her for three months, it appeared the

vessel was, on the 24th of November, 1868, lying at the pier at Port Stanley, loading with cordwood ; she had on board about sixty cords, and was not in good trim, being down by the head ; that the wind came up from the S. W. ; an anchor was got out to heave her out and get under weigh ; the anchor dragged ; another put out held a little, but dragged towards the beach ; the cables were then slipped ; they tried to get her head round to stand out, and before she got headway she struck a rock and was wrecked. A month before that she had her mainsail split, and was taken to Port Dalhousie and docked and caulked ; the mainsail was cut off at the second reef point, and two cloths taken out of the after leach ; this was done by the direction of the defendants' inspector. She afterwards took a cargo of hay to Toronto. The master stated he did not think her then in first-rate condition, and did not think she was seaworthy : that while at Toronto he saw the plaintiff, and advised laying the vessel up ; that she was not fit to go out at that season. The plaintiff replied he was to sail her, being in arrear with the hands, and no way to pay them except by her earnings. The master did not wish to go in her, from the state she was in. It did not appear from his evidence that there was anything of importance wrong with the vessel, except as to the mainsail. He said she was lost because they could not fetch her out of the harbour ; it was blowing fresh, and that he did not think they could have got out with any sail, and that she was lost by reason of the weather.

Another witness said, that for her class, being scow built, she was in a good state just before she left Toronto : that the mainsail and jib, although old, would have lasted two years : that he would have gone to sea with her ; that while a full mainsail would have been better, yet in a blow it would have to be reefed. It appeared also that she was well found in anchors.

On this evidence *J. H. Cameron*, Q. C., for the defendants, objected that the plaintiff failed, as the second plea was proved in substance, the vessel having left the port unseaworthy, citing *Thompson v. Hopper*, 6 E. & B. 937.

The learned Chief Justice was of opinion that the master's testimony was conclusive as to her unseaworthiness on leaving port, and, on the authority of the cases cited, that the plaintiff could not recover, being also of opinion that if the matter stated in the plea was a defence, the concluding allegation, that the loss was occasioned thereby, might be immaterial.

McMichael objected to this ruling, but in deference thereto took a nonsuit.

In last Easter term, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence for the consideration of the jury that the vessel was lost by the perils insured against, and not by reason of any of the exceptions in the policy.

During this term, *John Duggan*, Q. C., shewed cause, and cited *Thompson v. Hopper*, 6 E. & B. 172, 937; *Quebec Marine Insurance Company v. Commercial Bank of Canada*, L. R. 3 P. C. 234; *Coons v. Aetna Insurance Company*, 19 C. P. 235; *Myles v. Montreal Insurance Company*, 20 C. P. 283.

M. C. Cameron, Q. C., supported the rule, citing *Thompson v. Hopper*, 1 E. B. & E. 1038.

MORRISON, J., delivered the judgment of the Court.

The second plea in this case was framed, as stated in the argument, from the one in *Thompson v. Hopper*, 6 E. & B. 172, where the plea was held good on demurrer. On page 937 the case is again reported after the issue in fact was tried; and upon the authority of these decisions the learned Chief Justice apparently nonsuited the plaintiff.

There the jury found specifically that the plaintiff's themselves sent the vessel to sea: that on leaving the dock she was not in a fit and proper condition to go to sea, and that she was not seaworthy when she left the harbor; and the jury found in effect that the vessel was lost owing to the dragging of the cable and the inability to cut or slip it, which inability was accidental and arising at the moment,

and was not caused directly or indirectly by any unseaworthiness. A verdict on this finding was directed to be entered for the plaintiffs generally. A rule *nisi* for misdirection was granted, on the ground that it was not left to the jury to find whether or not the moving cause of the loss was the sending the ship to sea in an unseaworthy state, &c. Lord Campbell delivered the judgment of the court. It is not necessary that I should refer to it other than to say, that Lord Campbell said, p. 947, "The question which we have to determine is, whether the Judge was right in supposing the concluding allegation of the plea to be that the loss arose directly and proximately from the unseaworthiness." The rule was made absolute, on the ground that the Judge should have put it to the jury to say, "not only whether the loss was attributable to all or any of the alleged causes of unseaworthiness, but whether the loss was, in their opinion, occasioned by any wrongful act or default alleged in the plea, of which they shall believe upon the evidence that the assured were guilty." The case was appealed to the Exchequer Chamber, 1 E. B. & E. 1038, and the decision of the Queen's Bench reversed; and we have little doubt that if the attention of the learned Chief Justice had been directed to the judgments in the Exchequer Chamber, he would not have ruled as he did. I select a portion of Martin B.'s judgment as most applicable to the case before us. At page 1050, he says: "The question, to my mind, depends entirely upon the true meaning of the third plea. It states that the ship was knowingly sent to sea in an unseaworthy state and condition, and when she was not fit to go, and when it was dangerous for her to go; that she was wrongfully caused and permitted to remain in this state and condition upon the high seas near the shore, without a master and without a proper crew, and during which time, *by reason of the premises*, she was wrecked and lost. Now, I think this plea, like every other writing, ought to be construed according to the plain meaning its words indicate, and that the words *by reason of the premises* indicate that the ship was

directly and immediately, by reason of the matter stated in the plea, wrecked and lost ; and that if these matters do not at all or only remotely conduce to the loss, the plea was not proved." And after stating the evidence, he proceeds : " I think the Judge must be taken to have directed the jury to the effect which they found by their verdict, viz., that if the jury believe the loss was not caused, directly or indirectly, by unseaworthiness, but that it was owing to the dragging of the cable and the inability of the crew to slip it, which inability was accidental and arising at the moment, that the plea was not proved, and the plaintiff entitled to the verdict. This direction I think right, upon the assumption I have stated, and for the simple reason that, in my opinion, the plea alleges the loss to have been caused by the unseaworthiness, as the direct and moving cause." And Cockburn, C. J., said : " I think that, interpreting this plea according to the ordinary sense of language, we must take it to mean that the unseaworthiness was the approximate and immediate cause of the loss, which clearly was not the case. If it was intended to allege that the unseaworthiness occasioned the loss by leading to a state of things out of which the loss arose, the facts should have been so pleaded, not as matter of form, but of substance ; for it is plain that the plea in its present form would by no means inform the opposite party of the nature of the defence intended to be set up."

Applying the principle held by the learned Judges in that case, we cannot say that the evidence given on the trial of the cause proved the defendants' plea, that the proximate and immediate cause of the loss of the vessel was the alleged unseaworthiness, for we think it very clear that the evidence shews the cause of loss was the weather, the vessel being at an open pier or harbor exposed to the wind : that her anchors, in which she was well found, were dragging and driving on the beach ; that for the purpose of getting her outside her cables were slipped, and that she could not weather it, and struck a rock and was lost. What defects rendered her unseaworthy did not

appear; we have only the general statement of the master. He said, however, that she was lost by reason of the weather, and that she could not fetch out of the harbor. Whether the state of the mainsail or her trim in any way conduced to her inability to keep off the shore is another question. One witness said if blowing fresh it would have been necessary to reef it, and the master said that he did not think they could have got out with any sail, so that the inference would be that the state of the sail could not have contributed to the loss.

If, as said by Cockburn, C. J., it was intended to allege that the unseaworthiness occasioned the loss, by leading to a state of things out of which the loss arose, the facts should have been so pleaded. On the whole, we think the nonsuit should be set aside without costs.

Rule absolute.

HARRIS V. COOPER.

Marriage—Foreign law—Slavery.

The plaintiff in ejectment claimed as heir of his father, H., who, it appeared, while a slave in the State of Virginia, had in 1825 been married to the plaintiff's mother, S., also a slave. The marriage was performed by a Baptist minister, with the usual ceremony, and with all the formalities practicable to make it binding, but without a license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there.

It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying: that to constitute a strict legal marriage between free persons a license was essential; but that slaves could not obtain it or in any way contract a legal marriage, being regarded by the law as property only, not persons.

It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia arising from the law of slavery, which our law could not recognize; but

Held, otherwise; for the parties not being British subjects, as in *Ruding v. Smith*, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated.

EJECTMENT for part of lot 12 in the first concession from the Bay, east of the river Don, in the township of York.

The plaintiff claimed the land as the eldest son and heir-at-law of John Harris, formerly of Richmond, Virginia, who under the name of George Johnstone, by which name he was known in Canada, purchased the land from the Honourable John Beverley Robinson, from whom he got a deed of it on the 14th of September, 1847, &c.

The defendant defended for the whole land, and besides denying the plaintiff's title, he claimed title in himself by virtue of an agreement for the conveyance of the land to him made between Edward Osborne and defendant, under the name of George Cooper Osborne, &c.

The cause was tried at the last fall assizes, at Toronto, before Richards, C. J.

The evidence was to the following effect :

George Johnstone was before the year 1833 a citizen of Richmond, Virginia. He was married in or before 1825, and had two or three children. His name there was John Harris; his wife's name was Sarah. They were looked on as married people; he was a slave there; he rented a house in Richmond; he was a painter. The greater portion of his earnings went to his master. His wife earned money by washing, and paid a portion to her mistress. He escaped from slavery in or about 1832 or 1833, and that caused him to change his name. His wife never escaped from slavery; she died at Richmond, but she survived him; she died before the fall of Richmond, a slave. It was customary for slaves to hire their time from their masters by giving them, say \$100 a year. He came here in the spring of 1834, and died in February, 1851, without making a will.

William Costello said: I was present at the marriage in Richmond; his wife's name was Sarah Hallowsay; she was owned by Major Hallowsay; the marriage was at his house; they were married by Richard Vaughan, a Baptist minister; he was a free man. There was the same ceremony as any other marriage, but no license; a good many were present, both white and coloured, the house full; they had a house of their own and had three children; they were

considered man and wife by everybody. I was married in Richmond myself; I had a license; I know a license is necessary to a lawful marriage there; if the master gave a license they would be free; when slaves married there was no license.

Philip Anderson said: I formerly lived in Richmond, Virginia; I knew George Johnstone there, and also in New York and here; he was in New York in 1833: he was married there to a young woman named Sarah in 1833.

* * I heard of the marriage in Virginia; I spoke to him of it; he said that was a slave marriage, what of that; he thought it was not a valid marriage; I knew his Virginia wife; the second woman was a member of the Baptist church; they attended the church as man and wife; he could not be a member of the church in New York and live with a woman who was not his wife; he considered the marriage not a good one. I was a slave in Virginia; I did not consider his marriage there good; he and the last wife lived as man and wife here, and were so considered among the people. I brought my wife from Virginia; she was a free woman, I was a slave; I married her again in New York, to make the former marriage valid; I was bound by Heaven by the first marriage, but not by the law of the land.

The evidence taken under a commission shewed that the Virginia wife died at Richmond, within the twelve months before April, 1870, and that she was a slave until the fall of Richmond, at the close of the late civil war in the United States. One *Annie Blair*, a witness examined under the commission, said: "She married a man by the name of Brown, after John Harris left her."

The evidence by commission proved plainly that a marriage in fact had taken place between John Harris and Sarah in Richmond, as before mentioned. One witness, *Peggy Carter*, said: "I stood bridesmaid at the marriage." And it shewed also that John and Sarah were coloured persons and slaves while in Richmond.

The evidence of *William Wood Crump*, of Richmond,

Virginia, a member of the legal profession, qualified to practise in all the courts of that State, was taken. He said he had practised his profession for above twenty-seven years, with the exception of the time he was Judge of the Circuit Superior Court of Law for the city of Richmond and the county of Henrico.

He said in chief: "Persons had been held as slaves in Virginia since the year 1620 until within the last few years. The condition of slavery was recognized by the laws of Virginia throughout that whole period, until since the close of the war between the North and South. There was no law in Virginia, either common or statute law, relating to or recognizing the marriage of slaves. By the law of Virginia slaves were incapable of entering into the civil contract of marriage, and incapable by the same law of discharging the legal functions of husband and wife. Such has been the law of Virginia certainly since 1776, and to the best of my knowledge since 1620. No question of the legitimacy of children born of slave parents could ever arise in Virginia, because no legal marriage could have existed under its law. No form of marriage ceremony between slaves, or where one of the parties was a slave, could constitute a legal marriage in Virginia. I say "No, he would not be liable" (that is, he would not have been guilty of bigamy by the laws of Virginia, if after having performed while he was a slave the ceremony of marriage, so as to have constituted a valid marriage if he and the woman had both been free, he had after acquiring his freedom married a free woman, the first woman being then living). "I say the issue by the free woman, and that only, would be legitimate, because the issue of the slave woman were slaves and belonged absolutely to the mother's owner, and over them the supposed husband and father had no control whatever. He might be by her master denied access to her and her children, and the husband had no authority or control over them whatever, and no marital rights of any sort or kind except what were accorded him by the woman's master. The so-called marriages of slaves

and the children of such marriages were not recognized by the law of Virginia, and in no manner whatever affected the relations of master and slave. They might be sold by the master singly or together at his absolute will and pleasure; and if the husband were sold away the wife might marry again, or the husband might marry again whenever their respected masters consented, or the husband and wife might separate at their pleasure, and the law took no control over them."

He said on cross-examination: "Slavery has been abolished about five years ago, by force of arms, and by a constitutional provision. The marriage law of Virginia, I mean between free persons, in its essentials is the same with the marriage law of England. It is the same as it was fifty years ago; and to constitute a strictly legal marriage a license from the Clerk of the Court where the female resided was required. A license is essential to legal matrimony. No license could be issued to a slave, because he was not a person in the eye of the marriage law. Free negroes are now, and always were, subject to the same marriage law as the whites. Slaves could not formerly hold property of any kind."

The fifth interrogatory was: "If a male slave had married a female slave, and lived with her as man and wife all her life, and had children by her, and the female slave died before the abolition of slavery, and the male slave never married again, and after getting his freedom he acquired property both real and personal, and died intestate, would his children inherit his property or not, or what would become of it?"

The answer was, "I say that the children referred to would not inherit in Virginia as against the next of kin, unless some statute has been passed since the close of the war (I mean the war between the north and south) authorizing such children to inherit. I cannot remember whether such a statute has been passed, but my impression is that some statute has lately been passed relating to inheritance by children born in slavery. There was no law in Virginia

forbidding the marriage of slaves, as there was no law authorizing the marriage of slaves, and the reason why no law existed either authorizing or forbidding marriage was because slaves were property and not persons for marital purposes, and the master had the absolute regulation of the conduct of his slave in reference to the whole subject of matrimony. In short, by the law of Virginia slaves were but property, treated as property exclusively, except where by special statute they were made persons."

Upon this evidence a verdict was found for the defendant, with leave reserved to the plaintiff to move to enter a verdict for him if the Court should be of opinion he was entitled to succeed.

In Michaelmas Term last *G. T. Denison*, Jr., obtained a rule calling on the defendant to shew cause why the verdict rendered for the defendant should not be set aside and a verdict entered for the plaintiff, pursuant to leave reserved, on the following grounds:—For the misdirection of the learned Chief Justice, in directing a verdict for the defendant on the ground that the marriage which was proved to have taken place between John and Sarah Harris, in Richmond Virginia, was not a legal or valid marriage, whereas on the evidence produced a valid and legal marriage between these parties was proved.

Harrison, Q. C., and *Kingstone*, shewed cause. John Harris while a slave in Virginia had no capacity to contract a legal marriage there. The woman he then went through the ceremony of marriage with was also a slave. If he had been qualified to marry, he still could not, according to the evidence, have formed a legal marriage without a license first obtained for the purpose, and he did not obtain such a license. Marriage is a contract, and is generally regulated by legislation, and irrevocable, and governed by the *lex loci contractus*: *Story*, Conf. L., secs. 87, 93, 96, 113; *Herbert v. Herbert*, 2 Hagg. Consist. R. 263, 271; *Smith v. Maxwell*, R. & M. 80; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 54; *Swift v. Swift*, 3 Knapp 257; *Butler v. Freeman*, Ambler 313;

Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 404; *Middleton v. Janverin*, 2 Hagg. Consist. R. 437; *Kent v. Burgess*, 11 Sim. 361; *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92; *Shelford* on Mar. & Div. 128, 132, 140. The *lex loci* will not in all cases over-rule the law of domicile: *Brook v. Brook*, 3 Sm. & Giff. 481; the Sussex Peerage, 11 Cl. & Fin. 85. Marriages in a foreign country opposed to Christianity will not be recognized in England: *Hyde v. Hyde*, L. R. 1 P. & D. 130. Where the foreign law provides no means for the marriage of British subjects who are there, a marriage had there according to the law of England will be recognized as valid in England: *Cruise* on Dignities, 276; *Ruding v. Smith*, 2 Hagg. Consist. R. 371; *Lautour v. Teesdale*, 8 Taunt. 830; *Armitage v. Armitage*, L. R. 3 Eq. 347; *Connolly v. Woolrich*, 11 L. C. Jur. 197, 249; *epitomised* in 4 U. C. L. J. N. S. 57; *Rex v. The Inhabitants of Brampton*, 10 East 182; *Este v. Smyth*, 18 Beav. 112; *Dumoulin v. Druitt*, 13 Ir. C. L. Rep. 212; *Westlake* on Private International Law, 330. The plaintiff seeks to extend these decisions to foreigners, but they are plainly applicable to British subjects only. The fact of slavery constituting the incapacity to contract legal matrimony will not avail the plaintiff. His parents understood their incapacity, and it must be presumed they acted with a knowledge of its consequences. They did not mean by the ceremony they went through to bind themselves to live together as man and wife so long as they both should live, and this is shewn by their conduct. The husband soon after his escape from slavery married a free woman, and he did so, he said, because his slave marriage was of no effect, and this last woman he lived with as his lawful wife until his death in 1851; the plaintiff's mother, too, took another husband after John Harris left Virginia: See *Hyde v. Hyde*, L. R. 1 P. & D. 130; *Ardaseer Cursetjee v. Perozeboye*, 10 Moo. P. C. 375, 419; *Warrender v. Warrender*, 2 Cl. & Fin. 529; *Macneill v. Macgregor*, 2 Bligh N. S. 469; *Shelford* on Mar. & Div. 103. A slave marriage, it is said, is made good by freedom subsequently acquired: *Girod v. Lewis*, 6 Martin

La. R. 559; but that case is not approved of. See *Bishop* on Mar. & Div. vol. i. p. 159, commenting on it, and *Howard v. Howard*, 6 Jones N. C. Rep. 235. It is asserted every where that slaves are generally incapable of marriage. It is proved here expressly that in Virginia they were so incapable, and we cannot in this country recognize any other law as applicable to the marriage of John Harris in slavery than the law of Virginia. How can we or why should we apply British law to him an alien, and the subject of his own peculiar national law?

Denison supported the rule. 1. The rule of the *lex loci* is established for the express purpose of bringing in marriages, to give every facility to parties to effect marriage, and not to rule them out; for when this reason ceases, and the effect would be to rule them out, exceptions are allowed. The rule therefore does not apply here, and it is a fit case for exception: *Poynter* on Mar. & Div. 279; *Shelford*, Mar. & Div. 5, 123; 4 *Phillimore* International Law, 286; *Stor. Confl. L.* 89; *Connolly v. Woolrich*, 11 L. C. Jur. 197.

2. Insurmountable obstacles have been universally held as just ground of variation. The variation in this case was clearly insurmountable: *Poynter*, 280, 289, 290; *Cruise*, on Dignities, 276; *Bright, H. & W.* vol. i. p. 118; *Ruding v. Smith*, 2 Hagg. Consist. R. 391; *Lautour v. Teesdale*, 8 Taunt. 830.

3. General rules of natural law govern where other forms are shut out from the parties. The rules of natural law were more than complied with in this case,

4. This marriage should be held good on the maxim "*Semper præsumitur pro matrimonio*," and under the general principle of liberality in considering marriage as a question of international law: *Stor. Confl. L.* 36; *Shelford* Mar. & Div. 119; *Bishop* on Mar. & Div. vol. i. sec. 13.

5. Customs contrary to or at variance with the *lex loci* are sometimes allowed. The plaintiff has proved general custom and a marriage in strict accordance with that custom: *Lindo v. Belisario*, 1 Hagg. Consist. R. 216; *Bright, H. & W.*, vol. ii. p. 399; *Westlake*, Priv. Intern. L., Art. 157; *Burge* Colonial L. vol. i. p. 200.

6. Slavery and its disabilities are not recognized by our law. Our Courts cannot recognize incapacity to marry on account of slavery. See specially *Phillimore* Int. Law, vol. iv. p. 255, 256; *Stor. Confl. L.* 161, 319; *Shelf. Mar. & Div.* 118; *Forbes v. Cochrane*, 2 B. & C. 448, per *Best, J.*

7. Our Courts cannot recognize laws encouraging or permitting immorality, fornication, or incest.

8. Laws contrary to natural law and God's laws, and to the public policy of this country, are not entitled to recognition under the comity of nations, and there can be no comity between our courts and those of the United States on slavery, as we have not the institution.

9. Even slave State Courts have recognized the marriage of slaves as binding after manumission, clearly leaving slavery, that is, the continuance of slavery, as the only obstacle; and, as we do not recognize slavery, we cannot apply a harsher rule than a court of a slave state: *Girod v. Lewis*, 6 Martin La. Rep. 559.

10. The plaintiff has proved by sufficient evidence a marriage, and it is the evidence of the defence which seeks to apply the disabilities of slavery, or to apply the effects of slave law here. On the evidence for the plaintiff the marriage is *prima facie* proved sufficiently, and if the defendant did not appeal to the law of slavery his case would fail.

11. There was a custom proved here of slave marriages, and it was also proved that John Harris and Sarah, the parents of the plaintiff, were always recognized by every one as husband and wife.

12. The parties contracted, as far as it was possible to do so, with the intent of making a perfect contract of marriage, and it should be given effect to.

WILSON, J., delivered the judgment of the Court.

The quantity of land which John Harris died seized of appears to have been three acres. At the time of his death it was not probably of any great value, for in 1853, two years after his death, his widow, who had then

married one Scott, sold it to Mr. Boomer, under whom the defendant claims title, for \$300.

In 1855, Mr. Boomer sold two acres of the land to Osborne for \$800. At present the whole three acres may be of such a value as to make them worth this contest.

If the plaintiff fail in this suit he will fail to get that which he never had, and that which he had no expectation when his father bought it, nor for many years afterwards, of ever getting, as he was himself a slave until the end of the late American civil war; and he will fail to get that which, but for the Consol. Stat. C. ch. 8, and the Dominion Act, 31 Vic. ch. 66, he could not have been in a position to claim, as he was an alien until capacitated by that statute.

The defendant and those from whom he claims have had possession for seventeen years, which, although insufficient to make a perfect title, is nevertheless a possession which should receive protection against all claimants but those who have a very clear legal right to oppose to it.

In this case the plaintiff's right to recover depends upon his proving a legal marriage in fact between his father and mother.

A strictly legal marriage, according to the law of Virginia, where it took place, has not been and cannot be proved, for there was no license to authorize it. Mr. Crump, the professional witness, said, "to constitute a strictly legal marriage" even between white persons, "a license from the clerk of the Court where the female resided was required; a license is essential to legal matrimony; no license would be issued to a slave, because he was not a person in the eye of the marriage law."

But it was contended, that as a license could not have been granted for a slave marriage, such a marriage must be held valid without it, if not by the law of Virginia, by the general law which is applicable to marriages by the *jus gentium*.

That it was not a valid marriage by the law of Virginia at the time when it was performed is quite clear, for the parties were slaves, and by the law of that State

“slaves were incapable of entering into the civil contract of marriage, and incapable of discharging the legal functions of husband and wife.” That is the assertion made by Mr. Crump, in different forms of expression, throughout his examination.

It would not be necessary to pursue this enquiry further, for the general rule, that a foreign marriage, to be valid elsewhere than in the country where it has been celebrated, must be shewn to have been valid where it was celebrated, has not been established. On the contrary, the reverse has been proved.

But it is said, that when the parties have done all that it was in their power to do in the country of the marriage to make their marriage a perfect one, and when it is clear that they intended to make the complete relation of husband and wife between themselves, and their marriage ceremonial has been followed by cohabitation and the birth of children, that there is a law which we can give effect to, either parcel of our own law or of the law of nations, by which we can maintain that marriage, which was bad in the country of its celebration, as a good and valid marriage in this country.

The case of *Ruding v. Smith*, 2 Hagg. Consist. R. 371, was referred to in support of that argument. The facts of that case can, however, give no sanction to its application to the circumstances of this case.

There the parties were British subjects. The marriage was performed at the Cape of Good Hope, then lately ceded by the Dutch to the British. The ceremony was performed by a chaplain of the British forces according to the law of England, although not in conformity to the Dutch law, which was then in force. The husband was then above the age of twenty-one, and competent by the law of England to marry without the consent of parents or guardians, but by the Dutch law he could not marry until he was thirty years of age without such consent. The lady was under the age of nineteen. Her father was dead; her mother had married a second time, and she had no guardian.

Lord Stowell said, p. 389, "Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a question in an English Court whether a Dutch marriage of two British subjects not absolutely domiciled in Holland should be invalidated in England upon that account." He also said, "English decisions have established this rule, that a foreign marriage valid according to the law of the place where celebrated, is good everywhere else. But they have not, *e converso*, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is, therefore, certainly to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad."

This decision cannot by any possibility be extended to the case in hand. It is solely applicable to British subjects marrying out of England, or it may be in a country not part of the Empire, where, by reason of "legal difficulties," they cannot conform to the foreign law, and instead of it they follow that mode of procedure which by the law of their own country would have made a good marriage if it had been solemnized there. Mr. Justice Story, in his *Conflict of Laws*, sec. 119, in commenting on this case, says: "Lord Stowell held the marriage valid, on the distinct British character of the parties, on their independence of the Dutch law in their own British transactions, on the insuperable obstacles of obtaining any marriage conformable to the Dutch law, on the countenance given by British authority and British administration to this transaction, and upon the whole country being under British dominion."

Harford v. Morris, 2 Hagg. Consist. R. 423; *Lautour v. Teesdale*, 8 Taunt. 830; *Catherwood v. Easton*, 13 M. & W. 261; *Catterall v. Catterall*, 11 Jur. 914; *Burn v.*

Farrar, 2 Hagg. Consist. R. 369 ; and *Rex v. Inhabitants of Brampton*, 10 East 282, are to the same effect.

We entertain then no doubt that we cannot apply British law to John Harris and his alleged wife, who were born and brought up in the State of Virginia, and who married, or designed or attempted to marry, according to the law of that State, and with no view to or claim to or upon the laws of any other country whatever.

If the case had been reversed, if John Harris and the first Sarah had been in truth British subjects, and had been captured by the Turks or Algerines, or by the authorities of Virginia or any other slave State, in consequence of their colour, and been subjected to slavery, and while in that state they had married as formally as the law of the country where they were held allowed them to do, and with the intent of making it a valid marriage, and they had followed up that union by continued cohabitation, it is very probable that we should have extended to them the benefit of British law, because they were British subjects, and had never ceased to be so during all the time they were wrongfully held in bondage.

There is an insuperable difficulty in inverting that rule, and declaring that Turkish, Algerine, or American natives and slaves are not to have their rights determined by their own laws, but by the laws of another country in which they had no status, even although their own law denied them every kind of legal capacity, and recognized them only as goods and chattels, and on the grade of oxen and of beasts of burden.

Their condition in their own country does not raise that case of "necessity to contract marriage," or that "legal difficulty" or "insuperable obstacle" in the way of it to which the decisions apply, and against which in this country we can give relief.

If the question with which we had to deal were whether *slavery* reduced the condition of the depressed race as a necessary consequence, and as an inseparable result of its rigorous rule, to a state which wholly incapacitated them

from contracting a valid marriage, or from having or exercising any other civil rights, we should be enabled to enter into the large field which the argument opened up to us and invited us to enter. But we are of opinion that whatever conclusion we might come to on the case so presented, that it would be of little use to the plaintiff, for we must determine his rights, not by the effect of the general law of slavery, as we may find it to have existed or to exist in different countries, but by the special and restricted operation of it as it did exist in the State of Virginia at the time of the marriage in question.

By that law the parents of the plaintiff were not capable because they were slaves, of forming a legal marriage in that country, and because the marriage so performed was not valid there, and because it cannot be brought within any of the allowed exceptions which will support a marriage not conformable to the law of the place of its celebration. We cannot therefore hold it to be valid here.

This is no doubt an unfortunate conclusion, for the plaintiff is undoubtedly the child of John Harris and of Sarah, who were made man and wife in form and by all the usual solemnities of real matrimony. The parents were of mature age, of sound sense, reason, and understanding. The father had a trade, which he followed by the permission of his master for a yearly sum which he paid to him for the privilege, or, as it is said, "he hired his own time." He rented a house for himself; he was married with the consent of those who could give it by a minister in orders and in form at least under the sanction of religion; he lived with the woman he had taken as his wife, and had children by her, and left her only to gain his freedom; yet it is manifest, by the force of positive human law, there was no marriage and no legitimate issue.

I do not think it necessary to state at length all I have read on the subject, for the question cannot be determined by any general law, but by the law of Virginia only.

The following cases are therefore merely noted: Institutes of *Justinian*, lib. i. tit. 3, sec. 2; also, lib. i. tit. 8, sec. 1;

Montesquieu's Spirit of Laws, vol. i., book 15, chaps. 1, 2; *Somerset v. Stewart*, *Lofft* 1, 19; *Forbes v. Cochrane*, 2 B. & C. 448, per *Holroyd*, J., p. 461, per *Best*, J., p. 473; *Jefferys v. Boosey*, 1 Jur. N. S. 615, per Lord *Brougham*, p. 645; 2 *Kent's Com.* 264, 271, 272, note (b); *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters 539; *Commonwealth v. Aves*, 18 Pick. 193; *Story's Confl. L. passim*; *The Le Louis*, 2 Dodson Adm. Rep. 210; *The Antelope*, 10 Wheaton 66; *Bishop Mar. and Div.*, vol. i. secs. 156, 158, 160-163; *Taylor's Elements of Civil Law*, 407 to 447; *Buron v. Denman*, 2 Ex. 167; *Madrazo v. Willes*, 3 B. & Al. 353; *Cobb on Slavery*, sec. 270; *Jackson v. Lervey*, 5 Cowen 397; *The State v. Samuel*, 2 Dev. & Batt. N. C. Rep. 177.

I do not think, from these references or from any others I have seen, that incapacity to contract marriage was necessarily incident to a state of slavery, though from some of them it undoubtedly was. The list of authorities just given shews how far human law has proceeded in forbidding it, or in refusing to recognize it. And the defendant has therefore felt it necessary to prove the force and extent of the Virginia law applicable in this case, and has not relied on the mere proof of the plaintiff being the child of slave parents and born in slavery.

The following references shew how differently slavery has been dealt with in different countries: *Grote's History of Greece*, vol. ii., p. 97, notes; *Montesquieu's Spirit of Laws*, vol. i. ch. 15; *Tacitus Manners of the Germans*, vol. i. sec. 25; *Gibbon's History of Rome*, Boston edition, 6 volumes, 1856, vol. i. ch. ii. p. 49, and notes; *ibid.* 51, and notes, 56, 57; *Exodus*, ch. xxi., v. 2, 3, 4; *Prescott's History of Mexico*, vol. i., p. 37; 2 *Kent's Com.* 268, note (b); *ibid.* 279, 280, note; in *Howard's Laws of the British Colonies*, the Jamaica Act, 6 Geo. IV. ch. 19, at vol. i. 93; the Bahamas Act, 4 Geo. IV., ch. 6, vol. i. p. 360; the Trinidad Orders in Council of 26th March, 1812, vol. i. p. 534, and 10th March, 1824, vol. i. p. 572; the St. Lucia Order in Council of the 24th September, 1814, vol. i. p. 582; *The Overseers of the Poor of Marbleton v. The Overseers of the Poor of Kingston*, 20 Johns. R. 1., particularly the Act

of the Legislature referred to in it expressly validating the marriage of slaves; and upon this last point see also *Bishop on Mar. and Div.*, vol. i., sec. 155; *Taylor's Elements of Civil Law*, pp. 420, 421.

Villeins could always marry: *Co. Lit.* secs. 202, 209, and commentary thereon.

A fugitive slave, it is said, though he marry in a state where slavery does not exist, does not contract a lawful marriage, for his *status* has all along remained unchanged: *Cobb on Slavery*, sec. 277. His authorities do not establish that.

In the case of the slave *Grace*, 2 Hagg. Adm. R. 108, 132, Lord Stowell refers to cases where persons brought up with the expectation of considerable wealth acquired in England or in other countries had been subjected to the reverses of fortune which had befallen them on visiting the country of their parents, by being held and treated as slaves. Suppose such a person, while in England and a free man, had married, would his marriage have been good there? According to the general rule relating to matrimony, that it is governed by the *lex loci*, it would have been valid. If so, would it be valid in the slave country to which the escaped slave had returned? The marriage abroad of a person civilly dead by attainder for crime committed in England is valid in England, if it be valid in the country where it was performed: *Kynnaird v. Leslie*, L. R. 1 C. P. 389. It is argued in 1 *Bishop on Mar. and Div.*, secs. 162, 163, that slave marriages may or should after emancipation be rendered valid by cohabitation continued in the free state.

A marriage, though not a perfect marriage, could be formed by the civil law between slaves. Their union was styled contubernium, not connubium—"Figura et imago matrimonii tantum" (*Taylor's Elements of Civil law*, 287).

A morganatic marriage may still be formed in Germany. It does not confer on the wife the title, rank, or fortune of her husband, nor on the children of such a marriage the full status of legitimacy in the father's family, nor the right of succession to his estate or title, though the children are

legitimate members of the mother's family, and as such they can inherit among themselves.

So there may be a marriage perfect by the law of Scotland for all purposes, and in all its consequences, yet such marriage, though it constituted the relationship of husband and wife between the parties by English law, and controlled the personal estate of the parties, which followed the domicile, as an ordinary marriage does, is not a valid marriage as to real estate situate in England: *Doe dem. Birtwhistle v. Vardill*, 5 B. & C. 438, 7 Cl. & Fin. 895.

And a marriage illegal in England, as within the forbidden degrees, was nevertheless, before Lord Lyndhurst's Act, a marriage in fact, so as to confer on the children the rights of legitimacy as a perfectly legal marriage would have done, if that marriage had not been questioned and vacated in the lifetime of the parents. It became in its results the same as a legal marriage, because it could not be disputed after the death of the parents. Yet, though the legitimacy of the children could not be questioned in England, where the marriage took place, the legitimacy and the marriage were both enquirable into at any time in Scotland: *Fenton v. Livingstone*, 5 Jur. N. S. 1183.

In *Bishop on Mar. & Div.* vol. i. secs. 162, 163, it is argued, that as slave marriages are admitted to be warranted in morality, they should, though not allowed the full legal consequences of a valid marriage, be held to be good and binding marriages for all purposes after emancipation, if the cohabitation of the parties be still continued.

It is also said in the same work, sec. 158, that the reason a slave marriage is invalid is because it is incompatible with the duties of a slave. These duties, however, may or may not be incompatible with the law of slavery. That must depend on the nature of the law in the particular country in which it prevails. The law which permitted a slave to be the master of slaves would not, I think, render the marriage of that master slave incompatible with the degree of subjection he was under to his own master. In Massachusetts slaves were permitted to marry and to be divorced: *Bishop on Mar. & Div.*, vol. i., sec. 155.

In Scotland it is said to be the law that if a second marriage be solemnized and issue born, one of the parties being ignorant of the previous marriage of the other, the second marriage would be a putative marriage, and the issue be for some purposes legitimate: *Hill v. Hibbit*, Weekly Notes, 17th December, 1870, p. 256.

There are so many rules affecting the status of persons individually and in the different relations of life, in different countries, that it cannot be said with certainty what they are. We are not safe in saying more than that by positive law it is quite settled there may be the inferior status of slavery, with civil rights more or less restricted, and that there may be marriages or quasi marriages among slaves, with or without legal recognition, according to the special municipal law of the country where they take place. We are bound also to say that the law of slavery, according to its very definition, being contrary to nature, we know of no limit to which municipal law may not be carried against that subject race. The law which ordains that servile condition may attach to it any terms or degree of deprivation of civil rights which the power, the fear, or the caprice of the law makers may dictate. The laws therefore which incapacitate the slave from contracting a perfect marriage, or from acquiring property or from transmitting it to others, and which rank him in such matters and in many others as a chattel and not as a person, may be proper and reasonable in a system and to support a system which is founded upon and sanctioned by the violation of every principle of natural law.

The designation of the slave as a thing or a chattel was not however used as a term of reproach, but to describe, according to the civil law, the particular status of one in that condition. There were three necessary qualities required to constitute a *person*: liberty, citizenship, and family, "*quicumque nullo horum trium statuum gaudet, is non est persona secundum jus Romanum, sed res, quamvis homo sit.*" *Austin's Jurisprudence* 748-9, 362, 399-400.

The laws of Virginia, which govern the marriage in question, declared that the marriage of the plaintiff's parents was not a marriage in any form or for any purpose, and that the plaintiff was not a child capable of taking or inheriting his father's property or any other property whatever. That is just what the law was in England before the Reformation, by which the marriage of one of the regular or monastic clergy was held to be void, 12 Co. 9, 2 Inst. 687, *Com. Dig. Baron & Feme*, B. 6, and just what I presume we should still have to hold to be the law at this day in any foreign country where such marriages were prohibited and illegal.

We cannot either call in aid the late emancipation of all slaves in the United States, and the abolition of slavery, for its provisions have not been relied on nor brought before us, and because long before that time the plaintiff's father had formed a second marriage in a free state, and cohabited with that woman as his lawful wife until his death many years afterwards, and also because long before the abolition of slavery the plaintiff's father had died, and his mother, even in the father's lifetime, had, as a slave, married another man. They had each treated their own marriage as not binding upon them; and it is not likely there is any provision in the general emancipation law which could be serviceable to the plaintiff under these circumstances.

In our opinion, then, the plaintiff has not proved a full and valid marriage between his parents in the country where it took place, nor one which we can recognize, because they were not subjects of this country, nor subject to English law, and because they did not contract, and could not, from their place of origin and domicile, contract with any view whatever to English law, or to any other than their own imperfect law.

I regret, however, that we should be obliged to rest our decision on the recognition of slavery and on its bad code.

The rule must be discharged.

Rule discharged.

CARR AND JOHNSON V. TANNAHILL ET AL.

Pleading—Champerty—Contract—Illegal agreement made part of the consideration.

The plaintiffs declared that one J. R. owned a lot on which there was a mine, and the plaintiffs agreed with E. and G. respectively, that if they would procure a bond (set out) from R. to convey the mine to the plaintiffs for \$20,000, the plaintiffs would pay to each of them \$1,000, whereupon E. and G. procured from R. such bond and delivered it to the plaintiffs; and the defendant afterwards, on the 1st February, 1867, made an agreement with the plaintiffs (set out) by which the defendant and others agreed, among other things, to buy the mine for \$40,000, to carry on, at their expense, a suit then pending in Chancery, to deposit the money required therein as security for costs, and to give the plaintiffs each an interest of one-twentieth in the mine, provided the issue of said suit should give the plaintiffs a good title thereto, and to settle any claims by E. and G. against the plaintiffs. The declaration then alleged that afterwards E. and G. recovered judgments against the plaintiffs for the said sums of \$1,000 each: that the plaintiffs and the now defendants and others filed a bill in Chancery to restrain certain persons, to whom R. and others had sold the same interests sold to the plaintiffs, from working said mine, and for specific performance of R.'s bond to the plaintiffs: that the defendants in said bill answered that the plaintiffs therein, by their agreement of the 1st February, 1867, above stated, had been guilty of champerty and maintenance, and so should have no relief—to which the plaintiffs therein joined issued: that other persons named, claiming under R., filed a bill against the now plaintiffs and defendants, charging that said agreement was void for champerty and maintenance, to which defendants answered that it was not so void: that both the suits were brought to a hearing, at which all parties came to a compromise, and consented to a decree, by which, among other things, a certain portion of the land was to be conveyed to one G. as trustee for a company to be incorporated for carrying on the mine, and the moneys paid into the Court, including the sum deposited by the now defendants as security for costs in the Chancery suit, were to be disposed of as directed: that the money was paid out and conveyances made as decreed, and the company formed, in which defendants were stockholders, and worked the mine: and that all the land and benefits decreed to such company arose out of the agreement made by the plaintiffs with E. and G. and their agreement with R.—And the plaintiffs alleged that, in *consideration of the premises*, the defendants agreed to pay the plaintiffs the amount of the judgments recovered against them by E. and G., but did not pay.

Held, that the declaration was bad, for the promise was not based on the transactions subsequent to the agreement of the 1st February, 1867, which agreement had been held void for champerty, 30 U. C. R. 217, but that agreement was alleged to be part of the consideration, and being bad avoided the whole contract.

Held, also, that the denial by these defendants, in their answer in Chancery, that the agreement was illegal could not estop them from asserting such illegality here.

DECLARATION. For that one John Richardson was the owner in fee of the east half of lot 18 in the 5th concession

of the township of Madoc, in the County of Hastings, on which there was a gold mine, and which mine the plaintiffs herein were desirous of becoming the owners of, and with that object in view they desired the services of one William H. Elmer and one Robert T. Grey, and thereupon they agreed to and with the said Elmer and Grey, respectively, that if they would procure to them under seal from the said John Richardson a bond or agreement in the words following, that is to say: [The bond, which was set out verbatim, was by John Richardson to Joseph Flagg Carr, and Earl W. Johnson, the plaintiffs, in a penalty of \$20,000, dated 3rd November, 1866. It recited that John Richardson had agreed to sell to them all the ores and minerals on a certain part of the east half of lot 18, in the 5th concession of Madoc, setting it out by metes and bounds, together with a right of way, and other rights specified; and that they had agreed to pay Richardson \$20,000 therefor, and that Richardson had agreed to enter into a covenant to make good and confirm to them all rights and privileges granted to Daniel N. Powell for mining purposes, provided they could make terms with the said Daniel N. Powell for his privileges. And the condition was that if he, Richardson, should on or before the tenth day of December well and truly execute a deed of all such ores and mineral rights and privileges as aforesaid, &c., to them, or to such other persons as they might direct, they upon delivery of the said deed paying to said Richardson the said sum of \$20,000, then the bond should be void.] they, the now plaintiffs, would pay to them each the sum of \$1,000; whereupon the said Elmer and Grey did procure from the said Richardson such bond or agreement, and delivered the same to the plaintiffs; and afterwards the defendant Robert Tannahill entered into the following agreement for himself and the other defendants, under his, Robert Tannahill's seal, with the plaintiffs, in the words and figures following, namely: [This agreement, which was set out verbatim, and which was held in 30 U. C. R. 217 to be void for champerty and

maintenance, will be found in full there. It was dated 1st February, 1867, and provided, in substance, amongst other things, that the defendant and others should purchase the mine for \$40,000; that they should deposit the money required for security for costs in Court, and pay all costs of and carry on the suit in Chancery then pending: that they should pay all moneys due to Richardson and to Powell for the purchase of the mine, and should give to the plaintiffs an interest of one-twentieth part each in the property, provided the issue of the suit should give the plaintiffs a good title to the mine; and that they should settle all claims by E. and G. against the plaintiffs,] and which said agreement was entered into *bonâ fide*, as a regular business transaction, subsequently to which, and in pursuance thereof, the defendants, on the 16th February, 1867, wrote and signed the following acceptance:—

“ BELLEVILLE, 16th February, 1867.

“ GENTLEMEN,

“ In the agreement made the 1st day of February, inst., by and between Joseph Flagg Carr and Earl W. Johnson, of Boston, and Robert Tannahill, of Belleville, and other gentlemen who might become parties to said agreement, in reference to the Richardson gold mine, it is stated in the 6th paragraph that the said agreement is to be null and void unless accepted by said Tannahill and others within thirty days from the date of said agreement, and notice thereof given to said Carr and Johnson. We beg, therefore, to advise you that we have determined to accept and hereby accept the purchase of Messrs. Carr and Johnson's interests in the property referred to in said agreement named “The Richardson Gold Mine,” and that we are prepared to carry out said agreement on our part in its terms, and agree to do all the acts and things in said agreement stipulated for us to do, and to make and execute on our part all papers and documents necessary to carry out our part of said agreement or binding us to carry it out. Please advise us as to the amount of money required to be

deposited for security for costs or otherwise in reference to the suit in Chancery referred to in said agreement.

We are, Gentlemen, your obedient servants

(Sgd)	ROBERT TANNAHILL.
"	GEO. NEILSON.
"	JOHN SUTHERLAND.
"	JAMES GLASS.
"	SANDFORD BAKER. (a)

To Messrs. DIAMOND & DICKSON,

Solicitors for Messrs. Carr and Johnson, Belleville.

And whereas, subsequently thereto, the said Elmer and Grey each brought a separate action in one of the Superior Courts of the Province of Ontario against the now plaintiffs on the aforesaid agreement with them, to recover the said sums of \$1,000 each, and such suits came to trial, and were defended, and a verdict in each rendered against the now plaintiffs for the sum of \$1,000 each, without any collusion, on which judgments were respectively entered for such verdicts and costs of suits, and execution issued thereon against goods, and such executions were delivered to the Sheriff of the County of Hastings to be executed, and under which the now plaintiffs' goods were levied on.

And whereas the now plaintiffs filed a bill in the Court of Chancery, in Ontario, against the said John Richardson, Alfred Austee, and James St. Charles, which was subsequently amended by adding as plaintiffs the now defendants and others in the same interest, and by adding as additional defendants Benjamin Lombard and Seth W. Hardin, and by adding material other matters to the body of the said bill, which bill, among other things, set out in effect the agreement herein set forth, dated the 3rd of November, 1866; it also set out in effect an agreement dated 24th December, 1866, made by said John Richardson with the said defendants Nichols, Austee, and St. Charles, to sell to them the same property, minerals and mining rights, which he, Richardson, had previously agreed to sell the

(a) These were the five defendants in this suit.

plaintiffs as aforesaid, and it also set out in effect another agreement, dated on or about the 19th of January, 1867, by which the defendants Richardson, Nichols and St. Charles agreed to sell to the defendants Lombard and Hardin the same interests sold or agreed to be sold to the plaintiffs by agreement hereinbefore set forth, dated 3rd November, 1866, as by reference to such bill will more fully appear, which bill prayed for specific performance of the last mentioned agreement, and to restrain all the defendants from working the said mine, to which the defendants in said Chancery bill answered, that by reason of the agreement above set forth, dated the 1st February, 1867, and the subsequent acceptance thereof above set forth, dated 16th February, 1867, the plaintiffs in such bill named had been guilty of champerty and maintenance, or of conduct savoring of such, and should not be relieved by that Court, to which the plaintiffs therein joined issue.

And whereas certain persons, to wit, Daniel Nathaniel Powell, Nicholas Schneider, and William Berry, before the commencement of this suit, and after the agreement dated 1st February, 1867, and acceptance thereof, filed a bill in the said Court of Chancery against the now plaintiffs and the defendant Tannahill, setting out an agreement dated 1st February, 1865, in the words following: "An article of agreement between John Richardson, of, &c., of the first part and Daniel N. Powell, of, &c., Miller, of the second part, Know all men by these presents, that the aforesaid party of the first part doth agree and bind himself, his heirs, executors, administrators or assigns, to let the aforesaid party of the second part, his heirs, executors, administrators or assigns, work all the mines situate on or being found on lot 18, east half, in the 5th concession of the Township of Madoc, County of Hastings, Province of Canada, for which the said party of the first part his heirs, executors, administrators or assigns, is to receive one half of the mineral taken out of said mines. This agreement to be and remain in full force from the date hereof, so long as the mines are of value to work, subject, nevertheless, to the undersigned

proviso, that is, if the aforesaid party of the second part, his heirs, executors, administrators or assigns, let six months pass without working in the aforesaid mines, then this agreement to be null and void. And we have hereunto set our hands and affixed our seals this 1st day of February, 1865, in presence of these witnesses.

(Sgd.) JOHN RICHARDSON. (L.S.)

" DANIEL N. POWELL. (L.S.)

(Sgd.) JOHN RICHARDSON, JR.

" NICHOLAS SCHNEIDER.

And alleging that Powell employed Schneider and Berry as miners to prospect and work said mine, and setting out also an agreement wherein the said Powell and Schneider and Berry bound themselves to the now plaintiffs for \$15,000 to sell them the said mine, and their rights and privileges in said land, and also setting out the above stated agreement between the now plaintiffs and the now defendant Tannahill, dated first February, 1867, and charging that such last mentioned agreement was void for champerty and maintenance, and praying that the said contracts should be declared void as clouds on the plaintiffs' title therein, to which last mentioned bill the now plaintiffs, by their separate answer, set out the said last mentioned agreement, dated 1st February, 1867, and alleged that such contract was not void for champerty or maintenance; and the now defendant Tannahill, by his separate answer to said last mentioned bill, under oath, stated as follows: "I submit that the said agreement (then referring to the said agreement of 1st February, 1867,) is not void for champerty or maintenance, and allege that the same was entered into *bonâ fide* as an ordinary business transaction, believing the said Carr and Johnson (the now plaintiffs) to have a real legal and subsisting interest in the said land and mineral rights, of which interest I, on behalf of myself and other gentlemen, intended by said agreement to purchase from them nine-tenths." To which answer the plaintiffs in said bill joined issue.

And the now plaintiffs further allege that the said two Chancery suits were brought down to a hearing at Cobourg, at which hearing all the parties mentioned in the said Chancery suits came to a compromise by their counsel, and consented before the then presiding Vice-Chancellor, the Honorable Mr. Spragge, to a decree being made in both said Chancery suits, which decree was made and dated 11th June, 1867, and decreed, among other things, that the said causes were consolidated, and that a certain portion of said land and mine, setting the same out by metes and bounds, should be vested in said Lombard and Hardin forever, and that said Lombard should convey to James Glass, as a trustee for a company, to be called "The Richardson Gold Mining Company," certain lands also therein set out by metes and bounds; and it was also therein further decreed that said company be incorporated: that the capital stock should be \$300,000, the assumed value of a parcel of said land, in 3,000 shares of \$100 each, fully paid up, and \$160,000 of the capital stock to be held by Lombard and Hardin, and \$140,000 of said stock to be held by James Glass in trust for himself and his co-plaintiffs in one of said causes. And it was further decreed that said Lombard and Hardin should convey to said Glass in trust as aforesaid certain other portions of said land therein set forth, and also that a certain other portion of said land therein described was to be held by said John Richardson, subject to mining rights, &c., and that Richardson should have a certain royalty in the gold, and that the land vested in said Glass should by him be conveyed to the said company, with equal rights to use the water of a certain creek, &c. And it was further decreed that out of the moneys paid into the said Court of Chancery, the sum of \$30,000 be paid out to said Lombard and Hardin, and that the residue of the moneys in court, including the amount deposited by the plaintiffs in the suit, (mentioned in this declaration as the now plaintiffs, the defendants, and others) as security for costs of the said cause, be paid out to the said James Glass; and said decree also decreed that

nothing therein contained was to prejudice or affect any agreement between the plaintiffs in the said cause last herein referred to as amongst themselves; and that proper deeds should be executed by the proper parties. And the plaintiffs herein further allege, that the said decree was fully concurred in by all the parties to such suits, and the moneys were paid out and received as decreed, and the conveyances executed and delivered to the various parties of the said east half of lot 18 in the fifth concession of Madoc, on which the said mine was situated, which is the same land referred to throughout this declaration: that the said company was formed and scrip issued, and among the original stockholders who were members of the company were the now defendants. And it is also alleged that the said company did commence and work a gold mine on a portion of said land decreed and deeded to them pursuant to the decree, and took gold therefrom: that the said defendant Tannahill in all his acts referred to was at all times acting for himself and for the other defendants in this suit, and with their entire concurrence and directions, and that the moneys so decreed to be paid out as deposited for costs were the moneys deposited by the defendants under the agreement dated 1st February, 1867; and that the said James Glass mentioned in the decree is one of the now defendants, and was with the sanction of the said Court of Chancery acting for and on behalf of the now defendants as well as for himself. And the plaintiffs herein also allege that the lands so decreed to the said company, composed of the defendants and others, and all the other benefits therein decreed to them, and which they accepted, arose originally out of and by force of the above referred to agreement made by the plaintiffs herein with said Elmer and Grey, and the subsequent agreement dated 3rd November, 1866, above set out.

And the plaintiffs herein allege that, in consideration of the premises above set forth, the defendants subsequently promised the plaintiffs to pay them the amount of the said judgments so recovered against them by said Elmer and

Grey, but have not paid the same. And the plaintiffs claim \$3,000.

The defendants having pleaded, the plaintiffs demurred to the plea, and gave notice of the following exceptions to the declaration.

1. That the declaration shews no grounds upon which an assumpsit or promise can in law be implied such as is laid in the declaration.

2. That the facts alleged in the declaration shew that the plaintiffs have no cause of action.

3. That the declaration admits that the original contract between the parties to this suit, on which the proceedings mentioned in the declaration were founded, was void for champerty, and that no other promise, nor any consideration for an implied promise, is shewn in the declaration on which this action can be sustained.

Jellett, for the plaintiffs, relied upon the judgment of *Wilson, J.*, given upon the former demurrer, 30 U. C. R. 230, and contended that the declaration, as now framed, was in accordance with the suggestions there made.

John Bell, Q. C. (of Belleville), for defendants.

WILSON, J., delivered the judgment of the Court.

The agreement of Tannahill to purchase the mine, though then in litigation, was not necessarily illegal: *Harrington v. Long*, 2 M. & K. 593; 2 *Story's* Eq. Jur. sec. 1054. The agreement with respect to the costs, that Tannahill should pay them and carry on the proceedings, was probably illegal: *Ibid.*, and *Hunter v. Daniel*, 4 Hare 431; though why it should be so if the subject of the suit can be purchased, and can be prosecuted by a supplemental bill (*Ibid.*), it is difficult to comprehend.

But the agreement that Tannahill and those for whom he was acting should give two-twentieths of the property to the now plaintiffs, provided the issue of the Chancery suit, or of any suits or arrangements, gave to the plaintiffs a good title and conveyance from Richardson and Powell

to them, was an act of champerty. It was an agreement to divide the land and interest in the mine which was in dispute, on condition of the defendants carrying on the suit at their own expense: 4 *Bl. Com.* 135. A sharing in the profits to be derived from the success of the suit is essential to constitute champerty: *Hartley v. Russell*, 2 S. & St. 244, 252.

If the defendants had an interest in the property at the time of their purchase from the plaintiffs, the purchase or prosecution of the suit would not, I think, have been illegal: *Hunter v. Daniel*, 4 Hare 420, 430. Or if they then had such a claim which they believed gave them an interest in the property: *Findon v. Parker*, 11 M. & W. 675. Here there is no reason for presuming there was anything of the kind. The defendants appear to have been strangers to the title and the property at the time of their purchase: *Brealey v. Andrew*, 7 A. & E. 108.

The plaintiffs have therefore no remedy against them upon the agreement.

The question then is, whether the denial by the defendants in the two chancery suits that the agreement was affected with champerty binds them from now asserting the contrary. I do not think there can be an estoppel in such a case. It is quite clear that illegality can be pleaded to a deed: *Collins v. Blantern*, 1 Sm. L. C. 325, 6th ed. If the illegality did not appear on the deed, and were set up by plea and found against, it could not be afterwards asserted between the same parties.

Here the objection is on the face of the agreement; and I do not well see, so long as we are compelled to look at it, that we can say, whatever the parties themselves may have said or done, that it is different from what it appears to be. When the champerty was denied in the chancery suits, the plaintiffs and defendants in the present action were parties on the same side, and asserting the same matters and in the same interest. I do not know that such fact can make any difference. It appears, however, that the matter was never tried, but compromised. Still it was so after answer put in by the defendants, in which they accepted and made use of Tannahill's positive denial in his

answer under oath of the agreement being void for champerty or maintenance, on which issue was joined.

If there had been a trial and an adjudication upon the fact, determining there was no champerty, it is probable, though the agreement reads like one open to such a charge, that if the matter were again brought into litigation, that the second court would give effect to the finding and estoppel, if from any cause a more beneficial construction could be placed on the agreement, against the plainier and more obvious one.

Here there has been no such adjudication, but a decree by consent; and I think that cannot conclude in a case like this.

Boileau v. Rutlin, 2 Ex. 665, and *Buckmaster v. Meiklejohn*, 8 Ex. 634, shew the effect of pleadings against parties. They are not evidence of the facts stated in them unless found upon. An answer in Chancery is however evidence against the party, because it is under his oath. I think the answer is not conclusive, and that the consent decree does not in this case increase the effect of an estoppel, or constitute one against the plain reading of the agreement.

If however the amount now in controversy—that is the amount of the \$2,000 which the plaintiffs were to pay to Elmer and Grey, and for which the latter have got judgments against the plaintiffs, and which sums by the agreement the defendants were to pay in lieu of the plaintiffs to Elmer and Grey—can by any means be claimed without bringing forward or making use of the agreements of the 1st and 16th of February, 1867, to sustain the demand, no doubt the plaintiffs will be entitled to recover, as in the case of *Simpson v. Bloss*, 7 Taunt. 246, and *The Attorney General v. Hollingworth*, 2 H. & N. 416.

I incline to think that will be difficult to do. On this record it has not been done, for it is made the basis of the liability.

The decree does not notice the claims between the present plaintiffs and defendants. It does not direct that the defendants shall pay the sum now in question. If it did, it appears an action would have lain on it; *Henderson v. Henderson*, 6 Q. B. 288.

The plaintiffs, therefore, under the promise stated, would require to shew that the defendants engaged to pay a certain sum of \$2,000, which the plaintiffs were liable to pay to Elmer and Grey. On this record they could not do so without bringing forward and relying on the objectionable agreement.

If it be possible for them to sustain a case at all, it must be upon allegations distinct altogether from those which relate to that agreement.

Suppose that the defendants had said to the plaintiffs, during the pendency of the two Chancery suits, that if the plaintiffs would consent to a decree such as was made they, the defendants, would, among other things to be done by them, pay the plaintiffs the sum of \$2,000, which they were bound to pay to Elmer & Grey, or that they would pay to Elmer & Grey the said sum instead, it is possible that might be held to be such a new agreement, according to the authorities, distinct from the former one, on which an action might be maintained, free from the difficulty which applied to the original agreement.

Fisher v. Bridges, 3 E. & B. 642 would however have to be carefully considered, even if the case had been so stated. I do not think the case can be considered as one which the Court of Chancery has assented to and declared to be valid.

Some cases may be compromised and a contract made after the compromise will be sustained, but these are commonly matters in which the prosecutor has a private interest, as for an assault, &c. See *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371. In the present case the assumpsit based on "the premises above set forth" is plainly and directly relying still on the original agreement, and if part of the consideration be bad the whole contract fails: *Shackell v. Rosier*, 2 Bing. N. C. 634, 645; *Collins v. Blantern*, 1 Sm. L. C. 325.

In disposing of the case when it was before us on a former occasion, I intimated that probably the action might be maintained by setting out the agreement just as it

was made in fact, and the Chancery proceedings, and decree had and made on it, and then alleging a promise to be implied by law arising on the subsequent transactions to carry out the terms of the original agreement.

The promise has not been based on the subsequent transactions, but on the whole series of transactions which constitute "the premises," including the illegal agreement.

The object should have been to establish a cause of action apart from it altogether. The mere statement that the later transactions on which the new liability is rested arose from the original illegal agreement would not, I think be objectionable, but the agreement should not be made any part of the consideration or of the cause of action.

If the devise in trust for the person with whom the testator had made the illegal agreement were enforced specifically in equity, as it was in *Powell v. Knowler*, 2 Atk. 224, on the prayer of such person against the devisee in trust, although it was expressly stated in the will that the devise was made for the express purpose of fulfilling that agreement, there could have been and can be no objection to the Court of equity, on the consent of all parties, affirming by a decree that to which they had all consented, and enforcing afterwards the terms of that decree, or of a Court of law enforcing it in cases in which at law an action will lie. But the decree as before stated, takes no notice of the particular matter now in controversy, and so no remedy lies on it specifically. The decree, however, may constitute the ground for an action, if any, by promise or otherwise, have been made or can be implied in respect of it.

The words of Lord *Denman* in *McCallan v. Mortimer*, 9 M. & W. 636, referred to in the former case, must be borne in mind, that there must be a *dividing point* between the former illegal transaction and the new bargain. The plaintiffs must be able to say, as is said in that case, "At the time when the consideration arose on which the promise rests, the act out of which it arose was legal, and the parties were engaged in carrying into effect a lawful agreement."

How far an amendment may be made in the present count, or by adding a count, or otherwise, I will not nor am I prepared to say. If leave be given to amend, the plaintiffs must act of their own motion and on their own responsibility.

On the present pleadings, the promise being based upon the illegal agreement, there must be judgment for the defendants for the insufficiency of the declaration.

Judgment for defendants.

TRICKEY V. SEELEY ET AL.

Ejectment—Statute of Limitations.

In ejectment the plaintiff claimed as heir-at-law of his mother, T., a daughter of H. H. died in 1839, having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then 18, and they lived with her mother, he working the land, until 1844. T. died in 1848. About 1868 the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title to the land by length of possession.

Held, that the estate of the plaintiff's father in right of his wife being one for which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during his father's life.

Semble, that on the father's death he would still be barred, though he had never been in a position to sue,

EJECTMENT for one undivided eighth part of lot 6, in the second concession of the township of Rawdon.

The plaintiff claimed as heir-at-law of Eliza Trickey, deceased, who was one of the daughters of Hiram Cummings, deceased, who died possessed of the land.

Martin Seeley, besides denying the plaintiff's title, asserted title in himself by length of possession by himself and by those under whom he claimed. The other defendant did not appear.

The cause was tried at Belleville, before Morrison, J., in the fall of 1869.

The evidence shewed that Hiram Cummings made a will, and died in 1839; his widow married again in the

spring of 1843. The testator's daughter, Eliza Cummings, married Stephen Trickey, the father of the plaintiff, in December, 1842. She was then in her eighteenth year; she died in 1848. The family lived on the place after testator's death. The plaintiff's mother was married while she lived with her mother on the place, and she lived on it with her husband for about a year after her mother married a second time—that is, she moved off the place with her husband in 1844, and never since lived on it. The plaintiff came of age in December, 1868; he demanded the one-eighth share from the defendant before the bringing of the suit, and defendant refused to give it to him.

When the plaintiff's mother and her husband moved off the lot, they left the testator's widow and her second husband and her daughter on the lot. George Cummings, the eldest son of testator, got a title to six-eighths of the lot, and he sold his interest to the defendant. Defendant also married one of testator's daughters, and in her right was entitled to another one-eighth. The remaining eighth share was that which the plaintiff now claimed.

The plaintiff's father said he never had possession of the lot; he gave a surrender of his right to his son, the plaintiff. He said also that he worked the land up to the time he and his wife left the lot in 1844.

The devise was as follows: "And that my lawfully married and well beloved wife Abigail Cummings shall have and enjoy all the property that I shall possess at my decease during her natural life, or as long as she shall remain my widow; and at her decease or discontinuing to be my widow, or at any other time, according to the discretion of my executors hereafter named, or according to the situation of my family, I will and devise that all my property, both real and personal, be equally divided between my children lawfully begotten of my body," naming them. The wife was appointed an executrix of the will.

The defendant's counsel took several objections to the plaintiff's right to recover, and it was agreed that a verdict should be entered for the defendants, with leave to the

plaintiff to move to enter it for him, if the Court should be of opinion he was on the facts and law entitled to recover.

In Michaelmas Term thereafter (1869), *Wallbridge*, Q.C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, on the ground that the plaintiff proved his title as heir-at-law of his mother, who was a daughter and devisee of Hiram Cummings, who died seized of the land; that the objections taken to the plaintiff's recovery were no bar, as the termination of other estates had to happen or fall in before the plaintiff's right of action accrued, and the plaintiff's suit was brought within the time allowed by law.

In this Term *Bell*, Q. C., (of Belleville,) shewed cause. The plaintiff cannot sue at present, for his father is still living and a tenant by the curtesy; but the father's title is plainly barred by the Statute of Limitations. The plaintiff's mother became entitled to her one-eighth share on her mother's marriage in March, 1843, at which time she (the plaintiff's mother) and her husband were still living on the land, and they had then seizin of her share. She was then still under age; and she died covert in 1847. The plaintiff had twenty years from his mother's death within which to bring his action, and that time had expired before the 22nd of February, 1869, when the action was brought. The plaintiff must claim from his mother, because she took as devisee and not as heiress-at-law, and the Consol. Stat. U. C. ch. 82, sec. 4, does not therefore apply. The Interpretation clause of that Act, sec. 14, defines who a purchaser is. The case of *Wigle v. Merrick*, 8 C. P. 307, is therefore distinguishable from this case. He cited *Shelford's R. P. Stats.*, 150, 163, 192, 446, 447; *Williams R. P.* 92; *Wigle v. Stewart*, 28 U. C. R. 427; *Jones v. Cleaveland*, 16 U. C. R. 9; *Doe dem. George v. Jesson*, 6 East 80; *Dillon v. Leman*, 2 H. Bl. 584; *Bac. Abr.*, Limitation of Actions 368; *Stead v. Platt*, 18 Beav. 54; Consol. Stat. U. C. ch. 88, secs. 42, 45, 47; *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63.

Wallbridge, Q. C., supported the rule. The case last cited shews the actual possession may be shewn to have been in fact for another, the occupant setting up no title in himself. The plaintiff's mother never had seizin of her share. The plaintiff takes therefore direct from his grandfather, the testator, and so was entitled to the further period of ten years from the time of his coming of age. So also, if he claim under his mother, he is entitled to the further term of ten years in addition to the twenty years.

Defendant has a title to seven-eighths of the land. Though his deed from George Cummings, given in 1863, was of the whole land, yet George Cummings never claimed more than he really sold, his own six-eighths. He never claimed the share of the plaintiff, nor the share of the defendant's wife; yet the deed to the defendant nominally includes their two eighth shares. He cited *Doe Perry v. Henderson*, 3 U. C. R. 486; *Allen v. England*, 3 F. & F. 49; *White v. Bayley*, 10 C. B. N. S. 227; *Murray v. Hall*, 7 C. B. 441; *Doe dem. Hickman v. Haslewood*, 1 N. & P. 352; *Shelf*. R. P. Stat. 206-207; *McArthur v. McArthur*, 14 U. C. R. 544.

WILSON, J., delivered the judgment of the Court.

The testator's widow took an estate for her life, determinable upon the event of her marrying again, which is the meaning of the words "as long as she shall remain my widow." She married again in or about March, 1843.

The shares of the children then took effect by becoming estates in possession.

At that time the plaintiff's mother, who was entitled to a one-eighth share, was in her eighteenth year, and covert, living with her husband on the farm, on which her mother and the mother's second husband also resided, and on which the mother and herself had always up to that time resided.

The plaintiff's father and mother continued to live on the farm till about a year after her mother's second marriage, which would bring it to about March, 1844. The plaintiff's father during that time worked the land.

That, in our opinion, was an actual seisin or evidence of an actual seisin by the husband and wife of the wife's share, to entitle him to his curtesy, and the plaintiff as her son to his inheritance from her.

Her title therefore accrued in March, 1844, when she and her husband discontinued their possession. She was, however, then under the disability as well of coverture as of non-age.

She died in the early part of 1848. Her husband was then entitled to his curtesy. He certainly is barred from recovering as tenant in curtesy, even if he had not surrendered that estate to the plaintiff.

When the surrender was made does not appear, but as the plaintiff came of age in December, 1868, it was probably made about that time. The husband's estate in right of his wife began on his marriage in December, 1842, and as tenant by the curtesy it began as an estate *initiate*—*Jones v. Davies*, 5 H. & N. 776, 7 H. & N. 507; *Bac. Ab. Curtesy of England*, E.—on the birth of issue capable of inheriting to her, which would be in December, 1847, so far as the evidence shews when the plaintiff was born; and it became an estate *consummate* on the death of his wife.

The estate he had in possession in right of his wife in her lifetime was one for which he could have maintained an action or made an entry in March, 1844, when he and his wife left the land. He could not therefore recover in respect of his estate by the curtesy, even if the period of twenty years had not yet elapsed from the death of his wife: *Consol. Stat. U. C. ch. 88, sec. 48.*

This case can be disposed of on this ground alone, that the plaintiff cannot recover as against his father's estate by the curtesy so long as there are persons, of whom the defendant is one, who can set up the title of that estate as still continuing for his benefit even though the estate has since been surrendered to the plaintiff. The defendant has acquired a possessory right against the father of the plaintiff, which neither the father nor the son can defeat to his prejudice: *Wigle v. Merrick*, 8 C. P. 307.

But it is contended the plaintiff has a reversionary interest dependent on the estate by curtesy of his father, and that the period of limitation has not yet run against that reversion, for it is not as yet an estate in possession. That question, as has been said, need not now be determined. When the estate by curtesy is ended that question will be ripe for consideration.

The plaintiff, however, will have much difficulty in maintaining such a right. It is true he has never yet been able to bring an action or to make an entry on his own right; his father's estate has always stood and still stands in his way. But he may nevertheless have lost his rights, though he may never have had an opportunity of enforcing them. For as the cause of action accrued to his mother, whose rights he seeks to enforce, in March, 1844, when she and her husband discontinued their possession, and about five years of that fee simple interest were affected in her lifetime by the law of prescription, and as it is a rule of that law that when the time once begins to run it never stops, there may be much difficulty in establishing a right against the express language of the Act, however hard the operation of the law may be upon the plaintiff.

It is plain, however, he cannot maintain any action, for the reasons before given, while his father lives.

Rule discharged.

SCOTT V. McCABE.

Agreement—Construction—Pleading.

Declaration, that the plaintiff and defendant and one D. entered into an agreement under seal, set out, which was in substance as follows: D. has sold to defendant his interest in certain land and mills (described) for £1,350, which was held in trust by said D. for the plaintiff, and has conveyed it to defendant to be held in trust for the plaintiff, as it was held by D. The lien therefore which defendant has on said property is said sum of £1,350 paid by him to D. Plaintiff agrees to pay defendant said £1,350, with interest, as follows (setting out the times of payment). And further, D. delivers to defendant all the chattels on the premises, to be held in defendant's name, but for the plaintiff's benefit, and the business to be done in defendant's name, but the profits to go to the plaintiff. It was then alleged that the said agreement being in full force, the defendant, in breach thereof, distrained upon the plaintiff's goods, as his tenant, in the house he then dwelt in on the said premises, for £306, being, as the warrant of distress falsely alleged, the amount of rent due to defendant for the same on the 1st October then last, whereby the plaintiff, in order to obtain possession of his goods, was obliged to replevy them, and was put to great loss and expense, &c.

Held, that the declaration was bad, as not shewing a breach of any covenant contained in the agreement set out; for it was not alleged that the goods distrained were those mentioned in the deed, nor that the plaintiff was not defendant's tenant, nor that no rent was due, nor what proceedings were had in the replevin suit.

DECLARATION. Second count: That on the 31st of March, 1863, the plaintiff and defendant and Samuel Dickson made an agreement under their hands and seals, as follows: Memorandum of bargain between Samuel Dickson, of, &c., William McCabe, of, &c., and Adam Scott, of, &c. Samuel Dickson has sold to William McCabe his interest in the property in Manvers, known as Scott's mills, a particular description of which is contained in a certain deed made by said Samuel Dickson to said William McCabe, for the sum of £1,350, which said property was held in trust by said Dickson for said Scott. Said Dickson has conveyed said property by deed to said McCabe, to be held in trust for said Scott in the same manner as it was held by said Samuel Dickson. The lien therefore that McCabe has against said property is the aforesaid sum of £1,350 paid by him to Dickson, in consideration for said interest in said property. Scott agrees to pay to McCabe the said sum of £1,350, with interest at the rate of eight per

cent. per annum, as follows, viz.: the interest to be paid yearly on the whole sum, and the principal sum of £1350 on or before the expiration of five years, which will be on the thirty-first day of March, 1868. Should the said sum or any part thereof remain unpaid at the termination of said term of five years, and that said Scott wants to dispose of said property to liquidate the incumbrances against the same, then the said McCabe hereby agrees to enable the said Scott to make the disposal of the said property he can, by granting such deeds or conveyances of said property as may be required to enable said Scott to effect such sale of said property, said McCabe having been first paid the said principal sum of £1,350, with interest on the same as aforesaid. And further, the said Dickson delivers over to said McCabe all the chattels, consisting of, &c., now on the said premises, together with the stock of logs, &c., to be held in the name of said McCabe, but for the express benefit of said Scott; the business to be done in the name of the said McCabe, and all the goods to be held in his name, he to act as trustee thereof, but all the profits, interests, moneys, and other advantages arising from said business to be solely for the benefit of said Scott, his heirs, executors, or assigns. And said Scott and McCabe agree hereby to carry out all the arrangements herein contained towards each other, and to each other's heirs, executors, administrators, or assigns. In witness whereof, &c.

And the plaintiff says that the said agreement being so made as aforesaid, the said defendant, on the 15th day of March, 1865, made, in violation and breach of his said agreement, a landlord's warrant directed to one James McGill, his bailiff, signed by the defendant, in and by which the defendant commanded the said James McGill to distrain the goods and chattels of the plaintiff, as the tenant of the defendant, in the house he then dwelt in, and upon the premises in his possession (being the same premises in the said agreement or memorandum described), situate in, &c., for the sum of £306, being (as in the warrant falsely alleged) the amount of rent due to the defendant

for the same on the first day of October then last past, and for his so doing it should be his sufficient warrant; and the defendant then delivered the said warrant to the said James McGill, as such his bailiff, to be executed according to law, upon and by virtue of which said warrant the said James McGill did then seize and distrain upon the plaintiff's goods and chattels, that is to say (describing the goods), and did thereupon impound the same as such distress according to law; by means and in consequence whereof the plaintiff, in order to obtain possession and use thereof, was forced and obliged to and did replevy the said goods and chattels, and therein was put to great loss, trouble, and expense, and the trade and business of the plaintiff carried on on the premises, and in which he was so interested as aforesaid, was much injured, and therein and thereby, and otherwise, the plaintiff also suffered injury, loss and damage.

The plaintiff having demurred to the plea, the defendant joined in demurrer, and gave notice of the following exceptions to the declaration:

1. That no agreement is alleged of which the alleged breach is a breach.

2. That it is not shewn that the plaintiff was not tenant to the defendant of the premises mentioned in the said count, or that the defendant was not lawfully entitled to distrain the alleged goods.

3. That the said count shews that an action of replevin was brought for the distress complained of, and the plaintiff cannot maintain this action for the same thing.

Harrison, Q. C., for the plaintiff, argued that the exceptions to the declaration were founded upon the absence of allegations which were properly the subject of a plea, not grounds of demurrer.

C. S. Patterson, contra, contended that no such covenant could be found in the declaration as was assumed by the breach.

The argument proceeded chiefly upon the third exceptions, and is not reported, as the judgment is founded wholly upon the other two exceptions.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that the defendant is entitled to our judgment upon the exceptions taken to the second count, the principal question arising being whether the count shews a breach of any covenant on the part of the defendant appearing in the deed set out. The count is drawn in a loose and unsatisfactory manner. One cannot clearly see what connection the matter of complaint stated as a breach has with the provisions of the deed upon which it is alleged to be founded.

The breach complained of is the issuing of a distress warrant by the defendant to distrain on the plaintiff's goods for rent alleged to be due by the plaintiff, as tenant to defendant, in the house the plaintiff then dwelt in, and upon the premises in the plaintiff's possession, being the premises in the first part of the agreement mentioned, &c., and that the defendant under that warrant caused to be seized and distrained certain goods of the plaintiff (and which are specifically set out), and impounded them as a distress according to law; and that in consequence thereof the plaintiff was obliged to replevy them, &c.

It is not shewn or averred that the goods so distrained, or any of them, formed part of the goods, &c., mentioned in the deed, and which the defendant was to hold in trust for the plaintiff. The allegation is that the goods distrained were at the time goods of the plaintiff in his possession in the house in which he then lived.

We cannot see that this proceeding of the defendant is a breach of any covenant or agreement appearing in the deed set out in the count. These allegations are quite consistent with the non-violation of any stipulation on the part of the defendant. It is not averred that the plaintiff was not a tenant of the defendant, or that no rent was in arrear, or that the defendant was not entitled to distrain on these goods. The only allegation is that the seizure was for £306, being, as the warrant falsely alleged, the amount of rent due—not that there was no rent due. And again, although it is averred that the plaintiff had to replevy

to regain possession of his goods, it is not shewn what further proceedings were had in that suit. For all that appears, the plaintiff, after replevying the goods, may have paid the defendant the rent, and the trouble and expense the plaintiff complains of may have arisen from his own neglect. On the whole, we think the count is defective, as not shewing any breach of the agreement declared on. It is unnecessary to consider the sufficiency of the plea.

Judgment for defendant.

Regulae Generales.

HILARY TERM, 1871.

GENERAL RULES

MADE BY

THE HONORABLE WILLIAM BUELL RICHARDS, *Chief Justice of the Court of Queen's Bench*, THE HONORABLE JOHN GODFREY SPRAGGE, *Chancellor of Ontario*, and THE HONORABLE JOHN HAWKINS HAGARTY, *Chief Justice of the Court of Common Pleas*; the Judges for the time being for the trial of Election Petitions in the Province of Ontario, pursuant to the Controverted Elections Act of 1871.

I.

The Presentation of an Election Petition shall be made by leaving it at the office of the Clerk of the Crown in the Court of Queen's Bench, who, or his clerk, shall (if required) give a receipt, which may be in the following form :

Received on the day at the office
of the Clerk of the Crown, a petition touching the Election
of A. B., a member for purporting to be signed
by (*insert the names of Petitioners.*)

C. D., *Clerk.*

With the Petition shall also be left a copy thereof for the said Clerk of the Crown to send to the Returning Officer, pursuant to section 7 of the Act,

II.

An Election Petition shall contain the following statements:

1. It shall state the right of the Petitioner to petition within section 5 of the Act.

2. It shall state the holding and result of the Election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.

The Petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively; and no costs shall be allowed of drawing or copying any Petition not substantially in compliance with this Rule, unless otherwise ordered by the Court or a Judge.

IV.

The Petition shall conclude with a Prayer, as, for instance, that some specified person should be declared duly returned or elected, or that the Election should be declared void, or that a return may be enforced (as the case may be,) and shall be signed by all the Petitioners.

V.

The following form, or one to the like effect, shall be sufficient :

In the Queen's Bench.

THE "CONTROVERTED ELECTIONS ACT OF 1871."

Election for (*state the place*) holden on the day of
A.D.

The Petition of A, of (or of A, of and
of B, of , *as the case may be,*) whose names are
subscribed.

1. Your Petitioner A is a person (*or, if more than one, say, your Petitioners are persons*) who voted (*or had a right to vote, as the case may be*) at the above Election (*or claims to have had a right to be returned at the above Election, or was a candidate at the above Election.*)

2. And your Petitioners state that the Election was holden on the day of A.D. when A.B., C. D. and E. F. were candidates, and the Returning Officer has returned A. B. as being duly elected.

3. And your Petitioners say that (*here state the facts and grounds on which the Petitioners rely.*)

Wherefore your Petitioners pray that it may be determined that the said A. B. was not duly elected or returned, and that the Election was void, (*or that the said E. F. was duly elected and ought to have been returned, or as the case may be.*)

(Signed) A.
 B.

VI.

Evidence need not be stated in the Petition, but the Court or a Judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same way as in ordinary proceedings in the Court of Queen's Bench, and upon such terms as to costs and otherwise as may be ordered.

VII.

When a Petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the Election or return shall, six days before the day appointed for trial, deliver to the Clerk of the Crown and also at the address, if any, given by the Petitioners and Respondent (as the case may be,) a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Clerk of the Crown shall allow inspection and office-copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote nor upon any head of objection not specified in the list, except by leave of the Court or Judge upon such terms as to amendment of the list, postponement of the enquiry, and payment of costs, as may be ordered.

VIII.

When the Respondent in a Petition under the Act, complaining of an undue return and claiming the seat for some person, intends to give evidence to prove that the Election of such person was undue, pursuant to the 56th section of the Act, such Respondent shall, six days before the day appointed for trial, deliver to the Clerk of the Crown, and also at the address, if any, given by the Petitioner, a list of the objections to the Election upon which he intends to rely. And the Clerk of the Crown shall allow inspection and office-copies of such lists to all parties concerned; and no evidence shall be given by a Respondent of any objection to the Election not specified in the list, except by leave of the Court or Judge upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered.

IX.

With the Petition, Petitioners shall leave at the office of the Clerk of the Crown a writing, signed by them or on their behalf, giving the name of some person entitled to practice as an Attorney or whom they authorize to act as their Agent, or stating that they act for themselves, as the case may be, and in either case giving an address, within the City of Toronto, at which notices addressed to them may be left; and if no such writing be left or address given then notice of objection to the recognizances and all other notices and proceedings may be given by sticking up the same at the office of the Clerk of the Crown.

X.

Any person returned as a member may, at any time after he is returned, send or leave at the office of the Clerk of the Crown a writing signed by him or on his behalf, appointing a person entitled to practice as an Attorney to act as his Agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case

giving an address within the City of Toronto, at which notices may be left; and in default of such writing being left in a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the office of the Clerk of the Crown.

XI.

The Clerk of the Crown shall keep a book or books at his office in which he shall enter all addresses and the names of agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours, without payment of any fee.

XII.

The Clerk of the Crown shall, upon the presentation of the petition, forthwith send a copy of the petition to the Returning Officer, pursuant to section 7 of the Act, and shall therewith send the name of the Petitioner's Agent, if any, and of the address, if any, given as prescribed, and also of the name of the Respondent's Agent, and the address, if any, given as prescribed, and the Returning Officer shall forthwith publish those particulars along with the petition.

The cost of publication of this and other matter required to be published by the Returning Officer, shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition and of the nature of the proposed security, shall be five days, exclusive of the day of presentation.

XIV.

Where the Respondent has named an agent or given an address, the service of an Election Petition may be by delivery of it to the agent, or by posting it in a Registered letter to the address given at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the Respondent, unless a Judge, on an application made to him not later than five days after the Petition is presented, on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, including, when practicable, service upon an agent for election expenses, in which case the Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the sticking up in the office of the Clerk of the Crown a notice of the Petition having been presented, stating the Petitioner, the prayer, and the nature of the proposed security, shall be deemed equivalent to personal service, if so ordered by a Judge.

XVI.

The deposit of money by way of security for payment of costs, charges and expenses payable by the Petitioner, shall be made by payment into the Bank of British North America, in Toronto, to an account to be opened there by the description of "The Controverted Elections Act of 1871 Security Fund," which shall be vested in and drawn upon from time to time by the Chief Justice of the Queen's Bench for the time being (by checks countersigned by the Clerk of the Crown), for the purposes for which security is required by the said Act, and a Bank receipt or certificate for the same shall be forthwith left at the office of the Clerk of the Crown.

XVII.

All claims at law or in equity to money deposited or to be deposited in the Bank for payment of costs, charges, and expenses payable by the Petitioners, pursuant to the said 16th Rule, shall be disposed of by the Court of Queen's Bench or a Judge.

XVIII.

Money so deposited shall, if and when the same is no longer needed for securing payment of such costs, charges and expenses, be returned or otherwise disposed of as justice may require, by rule of the Court of Queen's Bench or order of a Judge.

XIX.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for as the Court or Judge may require.

XX.

The rule or order may direct payment either to the party in whose name the same is deposited, or to any person entitled to receive the same.

XXI.

Upon such rule or order being made, the amount may be drawn for by the Chief Justice of the Queen's Bench for the time being, by check countersigned as aforesaid.

XXII.

The Clerk of the Crown shall file such receipt or certificate, and keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount and the Petition to which it is applicable, which book may be inspected without payment of any fee.

XXIII.

The recognizance as security for costs may be acknowledged before a Judge at Chambers, or the Clerk of the Crown, or a Justice of the Peace in the Country.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more (not exceeding four), as may be convenient.

XXIV.

The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as

shall enable him to be found or ascertained, and may be as follows :—

Be it remembered, that on the day of in the year of our Lord, 18 , before me (*name and description*) came A. B. of (*name and description as above prescribed*) and acknowledged himself (*or severally acknowledged themselves*) to owe to our sovereign Lady the Queen the sum of eight hundred dollars (*or the following sums*) [that is to say] the said C. D. the sum of \$, the said E. F. the sum of \$, the said G. H. the sum of \$, and the said J. K. the sum of \$, to be levied on (*his or their respective*) goods and chattels, lands and tenements, to the use of our Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is that if (*here insert the names of all the Petitioners, and if more than one add, or any of them*) shall well and truly pay all costs, charges, and expenses, in respect of the Election Petition, signed by him (*or them*) relating to the (*here insert the name of the Electoral Division*) which shall become payable by the said Petitioner (*or Petitioners or any of them*) under the "Controverted Elections Act of 1871," to any person or persons, then this recognizance to be void, otherwise to stand in full force.

(Signed) (*Signatures of Securities*).

Taken and acknowledged by the above named (*names of sureties*) on the day of at before me

C. D.

A Justice of the Peace (*or as the case may be*).

XXV.

The recognizance or recognizances shall be left at the office of the Clerk of the Crown by or on behalf of the petitioner in like manner as before prescribed for the hearing (*a*) of a petition, forthwith after being acknowledged.

(*a*) *Sic*—Quære, leaving. See the English Rules, No. 20, in L. R. 4 C. P. 777.

XXVI.

The time for giving notice of any objection to a recognizance, under the 8th section of the Act, shall be within five days from the date of service of the notice of the petition and of the nature of the security, exclusive of the day of service.

XXVII.

An objection to the recognizance must state the ground or grounds thereof, as that the sureties, or any, and which of them, are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXVIII.

An objection made to the security shall be heard and decided by the Clerk of the Crown, subject to appeal within five days to a Judge, upon summons taken out by either party, to declare the security sufficient or insufficient.

XXIX.*

Such hearing and decision may be either upon affidavit or personal examination of witnesses, or both, as the Clerk of the Crown or Judge may think fit.

XXX.

If by order made upon such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 9th section of the said Act, and the petition shall be at issue.

XXXI.

If by order made on such summons an objection be allowed, and the security be declared insufficient, the Clerk of the Crown or Judge shall in such order state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already prescribed.

XXXII.

The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Clerk of the Crown or Judge, and in default of such order shall form part of the general costs of the petition.

XXXIII.

The costs of hearing and deciding an objection upon the grounds of insufficiency of a surety or sureties shall be paid by the petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency, unless at the time of leaving the recognizance with the Clerk of the Crown there be also left with him an affidavit of the sufficiency of the surety or sureties, sworn by each surety before a justice of the peace, which affidavit any justice of the peace is hereby authorized to take, or before some person authorized to take affidavits in some one of the Superior Courts, that he is seized or possessed of real or personal estate, or both, above what will satisfy his debts, of the clear value of the sum for which he is bound by his recognizance, which affidavit may be as follows :—

In the Queen's Bench.

“CONTROVERTED ELECTIONS ACT OF 1871.”

I, A. B., of (*as in recognizance*) make oath and say, that I am seized or possessed of real (*or personal*) estate, above what will satisfy my debts, of the clear value of \$

Sworn, &c.

XXXIV.

The order of the Clerk of the Crown for payment of costs shall have the same force as an order made by a Judge, and may be made a Rule of the Court of Queen's Bench, and enforced in like manner as a Judge's order.

XXXV.

The Clerk of the Crown shall make out the Election list. In it he shall insert the names of the Agents of the

Petitioners and Respondent, and the addresses to which notices may be sent, if any. The list may be inspected at the office of the Clerk of the Crown at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the said Act, and headed "Controverted Elections Act of 1871."

XXXVI.

The time and place of the trial of each Election Petition shall be fixed by the Judges on the rota, and notice thereof shall be given in writing by the Clerk of the Crown by sticking notice up in his office, sending one copy by the post to the address given by the Petitioner, another to the address given by the Respondent, if any, and a copy by the post to the Sheriff, fifteen days before the day appointed for the trial. The Sheriff shall forthwith publish the same in the Electoral Division.

XXXVII.

The sticking up of the notice of trial at the office of the Clerk of the Crown shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXXVIII.

The notice of trial may be in the following form:—

"CONTROVERTED ELECTIONS ACT OF 1871."

Election Petition of (*name the Electoral Division*). Take notice that the above Petition (*or Petitions*), will be tried at on the day of and on such other subsequent days as may be needful.

Dated the day of

By order.

(Signed,)

A. B.,

*Clerk of the Crown of the
Court of Queen's Bench.*

XXXIX.

That notice of the time and place of the trial of each Election Petition shall be transmitted by the Clerk of the Crown to the Clerk of the Crown in Chancery, and that the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver, or cause to be delivered, to the Registrar of the Judge who is to try the Petition, or his Deputy, the Poll Books, for which the Registrar or his Deputy shall give, if required, a receipt; and that the Registrar or his Deputy shall keep in safe custody the said Poll Books until the trial is over, and then return the same to the Crown Office.

XL.

A Judge may from time to time, by order made upon the application of a party to the Petition, or by notice in such form as the Judge may direct to be sent to the Sheriff, postpone the beginning of the trial to such day as he may name, and such notice, when received, shall be forthwith made public by the Sheriff.

XLI.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall *ipso facto* stand adjourned to the ensuing day, and so from day to day.

XLII.

No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the enquiry is concluded; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be recommenced and concluded by another Judge.

XLIII.

The application to state a special case may be made by rule in the Court of Queen's Bench when sitting, or by a summons before a Judge at Chambers, upon hearing the parties.

XLIV.

The title of the Court of Record held for the trial of an Election Petition may be as follows :

Court for the trial of an Election Petition for the (*name the Electoral Division*), between
 Petitioner, and , Respondent, and it
 shall be sufficient so to entitle all proceedings in that Court.

XLV.

An officer shall be appointed for each Court for the trial of an Election Petition, who shall attend at the trial in like manner as the Clerks of Assize and of arraigns attend at the Assizes.

Such officer may be called the Registrar of that Court. He by himself, or in case of need his sufficient Deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XLVI.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XLVII.

The order of a Judge to compel the attendance of a person as a witness may be in the following form :

Court for the trial of an Election Petition for (*complete the title of the Court*). The day of

To A. B. (*describe the Person*), you are hereby required to attend before the above Court at (*place*), on the day of , at the hour of (*or forthwith, as the case may be*), to be examined as a witness in the matter of the said Petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.,
Judge of the said Court.

XLVIII.

In the event of its being necessary to commit any person for contempt, the warrant may be as follows :

At a Court holden on at for the trial of an Election Petition for the (*here name the Electoral Division*), before the Honorable and one of the Judges [for the time being for the trial of Election Petitions, pursuant to the "Controverted Elections Act of 1871."

Whereas A. B. has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof. The said Court does, therefore, sentence the said A. B. for his said contempt to be imprisoned in the gaol for calendar months, and to pay to our Lady the Queen a fine of \$, and to be further imprisoned in the said gaol until the said fine be paid. And the Court further orders that the Sheriff of the said County (*or as the case may be*), and all constables and officers of the Peace of any County or place where the said A. B. may be found, shall take the said A. B. into custody, and convey him to the said gaol, and there deliver him into the custody of the gaoler thereof to undergo his said sentence. And the Court further orders the said gaoler to receive the said A. B. into his custody, and that he shall be detained in the said gaol in pursuance of the said sentence.

Signed the day of A.D.

(*To be signed by the Judge*).

XLIX.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and officers of the Peace of the County or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed, or any or either of them.

L.

All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under the "Controverted Elections Act of 1871," as a Judge at Chambers in the ordinary proceedings of the Superior Courts, and such questions and matters shall be heard and disposed of by one of the Judges upon the rota, if practicable, and if not, then by any Judge at Chambers.

LI.

Notice of an application for leave to withdraw a Petition shall be in writing and signed by the petitioners or their agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient :

"Controverted Elections Act of 1871." (*name the Electoral Division*) of

Petition of (*state petitioners*) presented
day of

The Petitioner proposes to apply to withdraw his Petition upon the following ground (*here state the ground*), and prays that a day may be appointed for hearing his application.

Dated this day of
(Signed),

LII.

The notice of application for leave to withdraw shall be left at the office of the Clerk of the Crown.

LIII.

A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his Petition shall be given by the Petitioner to the Respondent, and to the Returning Officer, who shall make it public in the Electoral Division

to which it relates, and shall be forthwith published by the Petitioner in at least one newspaper published or circulating in the place, if any.

The following may be the form of such notice :

“ Controverted Elections Act of 1871.” In the Election Petition for in which is Petitioner and Respondent. Notice is hereby given that the above Petitioner has on the day of lodged at the office of the Clerk of the Crown notice of an application to withdraw the Petition, of which notice the following is a copy (*set it out*). And take notice that, by the rule made by the Judges, any person who might have been a petitioner in respect of the said Election may, within five days after publication by the Returning Officer of this notice, give notice in writing of his intention on the hearing to apply for leave to be substituted as a Petitioner.

(Signed),

LIV,

Any person who might have been a Petitioner in respect of the Election to which the Petition relates may, within five days after such notice is published by the Returning Officer, give notice in writing, signed by him or on his behalf, to the Clerk of the Crown, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

LV.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court of Queen's Bench or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Clerk of the Crown as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the

Clerk of the Crown of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such time as the Judge directs.

LVI.

Notice of abatement of a Petition, by death of the Petitioner or surviving Petitioner, under section 40 of the said Act, shall be given by the party or person interested, in the same manner as notice of an application to withdraw a Petition; and the time within which application may be made to the Court or a Judge, by motion or summons at Chambers, to be substituted as a Petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstances, the Court or a Judge may allow.

LVII.

If the Respondent dies, or if the Legislative Assembly have resolved that his seat is vacant, any person entitled to be a Petitioner under the Act in respect of the election to which the petition relates, may give notice of the fact in the Electoral Division by causing such notice to be published in at least one newspaper published or circulating therein, if any, and by leaving a copy of such notice signed by him or on his behalf with the returning officer, and a like copy with the Clerk of the Crown.

LVIII.

The manner and time of the Respondent giving notice to the Court that he does not intend to oppose the Petition, shall be by leaving notice thereof, in writing, at the office of the Clerk of the Crown, signed by the Respondent, six days before the day appointed for trial, exclusive of the day of leaving such notice.

LIX.

Upon such notice being left at the office of the Clerk of the Crown, he shall forthwith send a copy thereof by the post to the Petitioner or his Agent, and to the Sheriff, who shall cause the same to be published in the Electoral Division.

LX.

The time for applying to be admitted as a Respondent in either of the events mentioned in the 41st section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or Judge may allow.

LXI.

Costs shall be taxed by the Clerk of the Crown, or at his request by any Master of a Superior Court, upon the rule of Court or Judge's order by which the costs are payable and costs when taxed may be recovered by execution issued upon the rule of Court ordering them to be paid; or if payable by order of a Judge, then by making such order a Rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in the bank available for the purpose, then to the extent of such money by order of the Chief Justice of the Queen's Bench, by check countersigned by the Clerk of the Crown.

The office-fees payable for inspection, office-copies, enrolment and other proceedings under the Act, and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of the Court of Queen's Bench.

LXII.

An Agent employed for the Petitioner or Respondent shall forthwith leave written notice at the office of the Clerk of the Crown of his appointment to act as such agent, and service of notices and proceedings upon such agent shall be sufficient for all purposes.

LXIII.

No proceeding under the "Controverted Elections Act of 1871" shall be defeated by any formal objection.

LXIV.

Any rule made or to be made in pursuance of the Act, if made in Term time, shall be published by being read by the Clerk of the Crown in the Court of Queen's Bench ; and if made out of Term, by a copy thereof being put up in the office of the Clerk of the Crown.

(Sgd.)	WILLIAM B. RICHARDS, C. J. Q. B.
"	J. G. SPRAGGE, C.
"	JOHN H. HAGARTY, C. J. C. P.

Dated the 11th day of March, A.D., 1871.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—WILLIAM HENRY LOCKHART GORDON, WILLIAM BOGGS, GEORGE LANGUISH TIZARD, GEORGE MILLER COX, JOHN GIBBS RIDOUT, WILLIAM WORTS EVATT, JOHN FARQUHAR BAIN, JOHN ROBISON CARTWRIGHT, JAMES JOSEPH FOY, SAMUEL ROBINSON CLARKE.

EASTER TERM, 34 VICTORIA, 1871.

(May 15th to June 3rd.)

Present:

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

PRINCE V. LEWIS.*Agency—Proof of.*

The facts being in substance the same as in *Prince v. Lewis*, 21 C. P. 63, the Court followed that decision, holding that the agent was not authorized to purchase the goods for defendant, for non-acceptance of which the action was brought.

Per Richards, C. J.—A plaintiff in such a case seeking to recover damages by reason of the fall in price, must give clear proof of agency to bind defendant.

IN this case the facts were substantially the same as reported in the case of *Prince et al. v. Lewis*, 21 C. P. 63, but the purchase was made from the plaintiff alone. Both cases were tried at the last Fall Assizes at Sandwich, before Wilson, J., without a jury, and a verdict in each given for the plaintiff.

In Michaelmas Term last, *Robinson*, Q.C., obtained a rule *nisi* to enter a verdict for defendant, to which *Anderson* shewed cause.

RICHARDS, C. J., delivered the judgment of the Court.

The case reported in 21 C. P. 63, goes over the evidence, which in fact was taken in this case, and the learned Judges

there arrived at the conclusion that a verdict should be entered for the defendant. We should have followed their decision without hesitation, were it not for the defendant's conversation, on the 25th July, at the "Tecumseth House," with his agent, through whom the sale was negotiated, and the impression which that made on my learned brother who tried the cause.

The action being one for the non-acceptance of goods, it rested on the plaintiff to shew a clear authority in the person who made the purchase to bind the defendant; and if that is not made out, of course the defendant ought not to be held liable for damages.

This action is not quite like the case where a defendant has received and used the property of another, has in fact received a benefit from it, who attempts to avoid paying an agreed price because an agent in that respect may have exceeded his authority on a very strict construction of the instrument under which he was assuming to act. Here the defendant received no benefit from the alleged purchase, and the plaintiff was not prevented from selling his oil but for a very short time.

It seems, in fact, like forcing a sale on a party because the article was likely to fall in price; and, on the other hand, it may be alleged that if the price of the article had gone up, the defendant would not have hesitated about availing himself of the purchase. The parties are therefore on their strict legal rights, and the plaintiff is bound to make out a clear case.

On reconsidering the facts, my learned brother has no very strong view of the case, and we think, on the whole, on the evidence, and in deference to the views of the Judges in the other Court, we should order a nonsuit.

Rule absolute.

WRIGHT V. CLUXTON AND DUNDAS.

Shipping—Carriage not completed—Right to freight.

The defendants shipped about 5000 bushels of grain on the 4th of December, on the plaintiff's vessel at Port Hope, to be carried to Oswego, at 8 cents a bushel freight. She was driven by stress of weather into Presque Isle, where she was frozen in, and the plaintiff had to procure a tug to break the ice and tow her out. When on her way to Oswego a leak was discovered, in consequence of which they changed their course and went to Charlotte, at the mouth of the Genesee river. The captain then telegraphed to V., who had shipped the grain for defendants, and who after communicating with defendants instructed him to discharge the cargo, which was done. About the 1st of April the plaintiff had the vessel ready to take the wheat on, but being a Canadian vessel the American Government refused to let him carry it, after it had been unloaded, from one American port to the other. The defendants did not again ask him to take it on, but sold it at Charlotte in April, the price being less than they would have got for it in December at Oswego, and considerable expense having been incurred by the delay. It was said that after discharging about 1200 bushels the vessel was so lightened that the leak could have been repaired, and she might have gone on; but the jury found that the captain's conduct was justifiable under the circumstances. *Held*, that there was evidence to shew an acceptance by defendants of the grain at Charlotte, and that they dispensed with the further carriage of it; and that the plaintiff was entitled therefore to recover freight *pro ratâ itineris*.

Held, also, that the loss caused by the delay could form no defence to such claim, though it might be the subject of a cross action.

DECLARATION.—For money payable by defendants to the plaintiff for freight, for the conveyance by the plaintiff for defendants at their request of goods in ships, and for work done, money paid, and money due on an account stated, and interest. Plea: never indebted.

The case was tried before Galt, J., at Cobourg, at the Fall Assizes of 1870.

It appeared on the trial that the plaintiff was owner of a vessel plying on Lake Ontario called the "Enterprise." On the 4th December, 1869, defendants shipped at Port Hope on board of her 3274 bushels of wheat, and 245 bushels of barley, to be delivered to Irwin & Sloan, at the Port of Oswego, the freight payable by consignee at 8 cents a bushel. There was also other grain belonging to Cluxton alone, shipped on the same vessel, consigned in the same way, and at the same rate of freight. By the bills of lading the dangers of navigation only were excepted.

The vessel started from Port Hope on the 4th or 5th of December, and in consequence of the severity of the weather put in at Presque Isle, below Cobourg; there was eight inches of ice on her decks when she got to Presque Isle. They ran into Presque Isle at 8 o'clock on Sunday evening. The wind blew hard until Tuesday morning. The ice made around them several miles into the lake, and was two inches thick. On Tuesday afternoon, the 7th December, the plaintiff was telegraphed to, and procured a tug, went to Presque Isle, broke the ice, and towed the vessel into the lake, and put her on her route to Oswego. The captain and crew after getting into the lake began to cut off the ice to lighten her; they found she was making water faster than the pumps could keep her clear, and on examination discovered that on the starboard bow the ice had pulled out the oakum from some of the seams, and when the vessel was sailing on that tack the open seam was pressed under the water, and they could not keep her clear; on changing the tack they found that the water could be pumped out. On that tack they could make Genesee River, and they thought it more prudent to do so than by going in the direction of Oswego to cause the open seam to let in the water.

On the 8th of December, after arriving at Charlotte, the mouth of the Genesee River, the Captain of the "Enterprise" telegraphed Mr. Edmund L. Vindin, at Port Hope, by whom the grain had been shipped for the defendants: "Ice has chaf't vessel so bad, making water fast on starboard side, had to come here. Men won't go further."

On this Mr. Vindin telegraphed defendant Cluxton, who resided in Peterborough, on the same day, "Just received from Charlotte from Enterprise, 'ice has chafed vessel so bad, making water on starboard side had to come here. Men won't go further.' What had better be done? Eaton & Upton have the elevator there."

On the same day defendant Cluxton telegraphed Mr. Vindin. "Better have the grain unloaded I should say; advise with Insurance Company."

On the same day Vindin telegraphed the Captain of the

"Enterprise" at Charlotte. "Discharge cargo. Hand bills to Eaton and Upton. Keep grain separate same as if you went to Oswego." He also telegraphed Eaton & Upton "Receive Enterprise cargo. Hold it subject to owner's orders. Keep lots separate, and insure."

Vindin wrote to defendant Cluxton on the 8th, informing him of the telegraphic messages sent to the Captain of the "Enterprise" and to Eaton & Upton about the cargo of the vessel.

On the 9th Cluxton wrote to Vindin and mentioned he was sorry to hear the "Enterprise" was lying at Charlotte; he did not suppose she was so bad as the Captain said, but supposed the men were afraid to be on the lake so late in the season. "It is likely the wheat will be sold in Rochester, although it will not do so well there as it would have done in Oswego. I don't know anything about the standing or responsibility of the elevator people Eaton & Upton. I suppose you have advised the Western Insurance Company, and that you have their instructions to this matter. How much per bushel did you insure for?" Vindin replied on the same day, saying he had sent the Western Insurance Company a copy of the Captain's telegraph, and told them the vessel was discharging there with the owner's consent. He added he did not anticipate there would be any claim to make against the Insurance Company, and that he had insured defendant Cluxton's 1750 bushels for \$1600.

After the receipt of the telegraph message from Mr. Vindin, the captain discharged the cargo of the "Enterprise" at Charlotte. The lightening of the vessel stopped the leaking. There was only about half a bushel of the grain damaged. After taking out 1200 bushels at Charlotte, the leak was then two or three inches out of water. The vessel could have gone to Oswego then if the leak had been repaired, and a carpenter could have done what was needful in half a day. After the vessel was lightened up, a clerk of Eaton & Upton said to the captain he might go on. He did not do so. He made no protest; neglected it.

The mate of the "Enterprise" was called by the plaintiff. He spoke of knocking off the ice, and stated he would not have gone on with the vessel in the state she was in when she went into Genessee River. He declined to say what he would have done if he had been in the captain's place, and said nothing as to what he would have done after the 1200 bushels had been taken out.

Evidence was given to shew the value of the freight to Charlotte; that it was worth as much to take it there as to Oswego, and that a return freight might have been obtained at Oswego, but not at Charlotte.

The defendants gave evidence to shew that by the cargo being left at Charlotte instead of Oswego, the extra expense was \$200. There was also a difference of fifteen cents a bushel on wheat, and seventeen cents on barley, between that sold in December and in April. Defendant Cluxton, in his evidence, said: "I thought it was fair to offer four cents in the spring; Mr. Dundas was willing to pay three cents. I never was satisfied to pay six cents."

By further letters put in at the time of the trial, being correspondence between the wharfinger, Vindin, and defendant Cluxton, reference was made to the freight, in Vindin's letter to Cluxton of the 13th December, as follows: "With reference to the freight, I hardly know about it: at any rate, it can remain until some one has been over and sees how the thing is going to turn out. Eaton & Upton did not pay the captain the freight at all. They told him it would be all right, and let him collect it here. This, of course, puts us here in a better position to talk to the captain and owners. No doubt the freight will have to be paid, but we can fight for some reduction. However, as I said before, it can remain for the present."

On the 14th of the same month Cluxton wrote to the wharfinger, "Mr. Dundas goes over to Charlotte to-day to look after the wheat. He does not feel disposed to pay the vessel any freight if it can be avoided."

It did not appear that this correspondence was communicated to the plaintiff. The plaintiff was made aware

of the telegrams that passed between Vindin, defendant Cluxton, and the captain of the vessel. Apparently nothing more took place to which he was a party, or of which he was made aware, until the last week in February, when he had a conversation with defendant Dundas. He asked for the freight. Dundas referred him to Cluxton, but said he thought the cargo would have to be shipped to Oswego, and asked the plaintiff if he was willing to take it. Plaintiff said, "By all means, at any time after the 1st of April, when insurance takes effect." He got his vessel all ready to go over, and take the cargo, but the American Government refused to allow it to be taken in a Canadian vessel. Defendants never afterwards applied to him to carry the cargo, or to provide another vessel, and about two weeks after the letter of the 1st of April came to hand Mr. Vindin told him that the balance of the cargo was sold in Charlotte; and that ended the transaction.

In the letter from Eaton & Upton to Vindin, of the 1st April, informing him that the United States Government refused to allow the Canadian vessel to take the cargo to Oswego, they stated that they had sold the barley, and that Cluxton & Dundas, in a letter to them, said they would prefer to have it (the wheat) sold there, even at \$1.45, rather than to move it. The grain was worth more at Charlotte than at Port Hope.

The insurance company allowed \$200 in consequence of what occurred, the wheat being insured.

The learned Judge told the jury, that if the captain's telegram was not a true statement of the position of the vessel, he thought they would not consider the parties bound by any action taken in consequence of that misrepresentation: that Mr. Vindin might well be looked upon by the captain as acting for the owners of the cargo, and anything done by him in consequence of that intention would be binding on them. If the jury thought the captain properly performed his duty, they should find for the plaintiff, but if, on the other hand, they were of opinion the captain did not properly discharge his duty, and misrepresented the condition of the vessel, they should find for defendants.

For the plaintiff, it was objected that the learned Judge should have told the jury that the sale of the barley before Wright had an opportunity of carrying it in the spring, made defendants liable to pay *pro ratâ itineris*.

For defendants, it was objected that the evidence did not shew Vindin to be the agent of defendants to order the discharge of the cargo, and that the learned Judge should have so charged the jury.

There was evidence given on the trial that the plaintiff was told that the wheat ought to be sent to Oswego, and he assented to the proposition to take it there, and got his vessel ready for that purpose about the 1st of April when insurance could be had; but the American Government refused to allow his vessel, a Canadian one, to take the grain, after it had been unladen, from one American port to another. The defendants never applied after to the plaintiff to take it. They sold the barley in April. The date of the sale of the wheat was not mentioned.

The jury found for the plaintiff and \$158.50 damages.

In Michaelmas term last, *Hector Cameron* obtained a rule *nisi* on behalf of the defendants to set aside the verdict, and for a new trial, the verdict being contrary to law and evidence, and the Judge's charge; the evidence clearly shewing the captain was not justified by the facts in sending the message he did, and that the vessel could readily have continued her voyage and delivered her cargo at Oswego; and on the ground that Vindin was not, according to the evidence, the agent of the defendants in sending instructions to unload the cargo at Charlotte; and on the discovery of fresh evidence, as shewn by affidavits filed.

[The contents of the affidavits on either side were stated by the learned Chief Justice in giving judgment, but it is considered unnecessary to report them here.]

During the same term, *Armour*, Q.C., shewed cause. The jury have found that the captain was justified in what he did, and there is nothing to shew that up to the time of his

telegraphing Vindin, and getting directions to unload, the course he was taking was not the proper one. It may be he erred in judgment, after taking out the 1,200 bushels, that he did not repair the vessel and proceed on his voyage; but at that season of the year, with the experience he had just had, he could not be considered as to blame. Besides, the plaintiff offered to take the cargo to Oswego in the spring, but part was sold; and there was no wish apparently on defendants' part that it should go to Oswego then. As to Vindin's agency, he informed Cluxton of what he had done, and the latter did not dissent. He cited *The Soblomsten*, L. R. 1 Ad. & Ecc. 293; *Vlierboom v. Chapman*, 13 M. & W. 230; *Hunter v. Prinsep*, 10 East 378; *Cleary v. McAndrew*, *The Cargo ex Galam*, 2 Moore P. C. N. S. 216; *Luke v. Lyde*, 2 Burr. 889; *Angell on Carriers*, ed. 1868, 342.

H. Cameron, contra. The captain was not justified by the facts in sending the message. When the cargo was discharged no part of it was wet. They found some caulking out forward and aft, but half a day's work would have made her all right. They were told to go on, but they would not; and the consequence of their not leaving was a loss to defendants far beyond the freight. Vindin was only a shipping agent, whose duties ended when the grain was shipped: *Angell on Carriers*, sec. 407; *Abbott on Shipping*, under the head of Unearned Freight.

RICHARDS, C. J., delivered the judgment of the Court.

The jury have found in this case that the captain acted properly in the course he took; and if that finding cannot be set aside, the right of the plaintiff to recover depends on the question whether the grain was taken back by the defendants absolutely and unconditionally, by consent on both sides, the further carriage of the goods being intentionally dispensed with. In such a case the shipowner becomes entitled to the freight *pro rata itineris*: *Blasco v. Fletcher*, 14 C. B. N. S. 178. And in the note to the American edition of that report, referring to *Hurtin v. The*

Union Insurance Company, 1 W. C. C. R. 530, it is said Judge Washington laid down the law as follows: "If the cargo is not conveyed to its place of destination, no freight can be demanded. If voluntarily accepted at any other port by the owner or his supercargo, freight *pro ratâ itineris* is due."

The extra expense at Rochester was upwards of \$200, but that arose from the delay, in insurance, storage, &c., inasmuch as if the cargo had reached Oswego it would have been sold at once, and by the delay there was also a difference of 15 cents per bushel on the wheat sold in December and April, and 17 cents on the barley. There could be no abatement in the action for the freight on account of this delay. The general doctrine on this subject, as I understand it, is, the law implies in all contracts by charter party, when there is no express agreement as to time, a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, or, if it has commenced, no deviation in the performance of it; but although a breach of this gives the freighter a right to damages, it is no defence to an action for non-performance of his own part of the contract, unless the plea shews that the purposes of the charter party were altogether frustrated by the delay: *MacLachlan* on Merchant Shipping, 322.

When the Captain of the "Enterprise" telegraphed Mr. Vindin from Charlotte as to the condition of the vessel, there is no room to doubt that what he did was in good faith, believing that he could not go to Oswego with safety to the vessel or cargo; and Mr. Vindin telegraphed the captain to discharge the cargo, to hand bills to Eaton & Upton, and keep grain separate, the same as if he had gone to Oswego; and he telegraphed Eaton & Upton to receive the cargo of the "Enterprise," and hold it subject to the owner's orders, to keep lots separate, and insure.

These telegrams, and the information contained in them, as well as that received from the master of the schooner, were known to defendants and to plaintiff, and no objections taken to them. So the vessel was unloaded, and the

cargo delivered to Eaton & Upton to hold for the owners, with the consent of all parties, the plaintiff as owner of the vessel and entitled to the freight, and defendants as owners of the wheat, &c., and bound to pay the freight, if any payable. From the correspondence, it appears the master did claim freight at the time, but was referred to the owners on this side of the lake. It is now contended that the captain, after taking out the 1200 bushels, should have repaired the vessel and proceeded on his voyage, and that he was told to do so by Eaton & Upton's clerk. Perhaps, as the matter turned out, that would have been the better course, but at that season of the year the weather was very uncertain. They had already been frozen in. They had commenced to unload; had probably incurred expenses, and may have been acting in good faith in what they did. At all events, the jury have so found; and on a point like that, under the circumstances of this case, the Court would not feel warranted in sending the case down to another trial.

Then, supposing the vessel unloaded with the consent of all parties, did the master and owner thereby intend to abandon the freight? We think not. The circumstances seem to repel that view. Then the owner of the vessel would be allowed a reasonable time to take it to its destination to earn the whole freight. He could ship it in his own vessel, if allowed to do so, or another vessel if necessary. The first of April, when insurance could be obtained, would probably be a reasonable time, if defendants wished the wheat taken to Oswego. Plaintiff was willing to take it there, and fitted out his own vessel for that purpose. The United States Government, however, being applied to, refused to permit the plaintiff's vessel to take the wheat from Charlotte to Oswego, and within two weeks after that he was informed the wheat was sold at Charlotte, and before the first of April defendants appear to have authorized the sale of it at Charlotte, and it was sold accordingly.

We cannot say from the evidence that the defendants against their will were obliged to take the wheat at

Charlotte. The plaintiff when applied to expressed his willingness to take it to Oswego, but defendants appear to have sold it at Charlotte without giving him the option of taking it to Oswego. Is not this evidence to shew that they were then willing to accept the wheat at Charlotte, and that they dispensed with the further carriage to Oswego? If so, and it appears to us it is, then the plaintiff is entitled to claim *pro ratâ* freight.

The extra expense of storing at Charlotte appears to have been paid by the Insurance Company, \$200. The difference in price between December and April seems to be on account of the delay in delivery at Oswego, and the bill of lading does not require a delivery at a specified time as a condition precedent to recovering freight.

The defendants themselves, in the conversation with the plaintiff, seemed willing to pay some freight. Mr. Cluxton said he thought it was fair to offer four cents in the spring, that Mr. Dundas was willing to pay three. One witness proved he received for freight to Charlotte from Colborne six cents per bushel last winter, and that it would be worth as much from Port Hope. Mr. Upton, the wharfinger at Charlotte, said he thought six cents very high, and would consider five a fair freight. The jury allowed \$158.50, about four-and-a-half cents, Canada money, probably equal to five, American money. Mr. Cluxton himself was willing to pay four, which would make a difference of \$34.91. We would not grant a new trial for a sum like this, particularly as it could only be granted on payment of costs.

After the evidence of Mr. Cluxton, that he thought it was fair to offer four cents in the spring, connected with the other facts of the case, I cannot imagine any jury would give a verdict for the defendants.

The case of *Blasco v. Fletcher* may be referred to as citing most of the cases as to unearned freight, and generally as to the right of the ship owner to carry to the place of destination, though the voyage were interrupted. The argument of the plaintiff's counsel was well described by Mr. Justice Williams, who gave the judgment of the

Court, as one of "uncommon force and learning." See also the judgment of Dr. Lushington in the case of the *Soblomsten*, L. R. 1 Adm. & Ecc. 293.

The affidavits we think fail to shew sufficient grounds to grant a new trial on the discovery of new evidence.

We think the rule should be discharged.

Rule discharged.

COVERT v. ROBERTSON.

Practice—Service of papers—Sticking up in C. C. Office—Laches—C. C. rule of Court 131—C. L. P. Act, secs. 52, 53.

The defendant in a County Court suit appeared in person, but gave no address for the service of papers, as required by secs. 52 and 53 of the C. L. P. Act and C. C. Rule of Court No. 131. The declaration was served on him personally, and pleas filed. The person who served the pleas for him refused to receive the issue book, notice of trial, &c., and they were stuck up in the office of the Clerk of the Court. The plaintiff took a verdict on the 20th April, the defendant not appearing, and the defendant was informed of it on the 27th. No steps were taken by him to stay proceedings, and final judgment was entered on the 5th May. Defendant in Easter Term following moved for a new trial.

Held, that the plaintiff's proceeding was warranted by the rule of Court, notwithstanding the declaration had been personally served.

Semble, that if it were irregular, the defendant, on being aware of the verdict, should have moved to stay the plaintiff's proceedings, and that at all events he should have done so if he wished to move upon the merits.

O'Neill v. Everett, 3 P. R. 98, distinguished.

THIS was an action brought in the County Court of the County of Peterborough.

The plaintiff declared on an agreement by which he agreed to sell and defendant to purchase all the plaintiff's right and title to the west half of lot 17 in the first concession of Madoc, for \$300, which it was alleged defendant had not paid. Common counts were added.

Pleas: 1. Did not agree as alleged. 2. That defendant was induced to make the alleged agreement by the fraud and misrepresentation of the plaintiff, who stated and represented to the defendant that the plaintiff had some

interest in, or right or title to the land, whereas in truth the plaintiff had not then, or at any time since, any such interest, right, or title, as the plaintiff at the time well knew. 3. Never indebted. Issue.

The case was tried before Wilson, J., at Peterborough, in the spring of 1869, when a verdict was taken for the plaintiff for \$214, no one appearing for the defendant, and the instrument set out in the declaration having been admitted. The verdict was taken on the 20th April, 1869, and final judgment was entered in the cause on the 5th of May.

In Easter Term following, on the 20th May, 1869, *McMichael* obtained a rule *nisi* for a new trial, on such terms as the Court might think fit, on the grounds: 1. That no proper notice of trial was given, and no replication served, or issue joined on the pleas filed by defendant. 2. That defendant was misled by the plaintiff serving the declaration in his office in Toronto, and then, without notice to defendant, sticking up the remainder of the papers, notice of trial and replication, in the Crown office at Peterborough, and bringing the case to trial without any notice, and without his having knowledge thereof until long after the trial. 3. And on the ground that defendant has a defence to the action on the merits, and was, by the mode in which the papers were filed and left at the Crown office, prevented from having his defence at the trial, or offering any defence at all; and on grounds disclosed in affidavits and papers filed.

On obtaining the rule the defendant filed his own affidavit, stating that he had a good defence on the merits, as he was advised and believed: that he appeared to the action in due time, in person, and the declaration was served, as he was informed, on a clerk in his office: that no joinder of issue, notice of trial, or other paper or pleading subsequent to the declaration in the cause, had been served, as he was informed and believed. He was informed a couple of weeks before the making of the affidavit that

judgment had been signed, a verdict having been taken at the last Peterborough Assizes.

Defendant also filed the affidavit of the person who negotiated the purchase by the defendant from the plaintiff of the land, tending to support the plea of fraud.

From the affidavits filed on behalf of the plaintiff in reply, it appeared that no memorandum was filed with the appearance in the cause with the Clerk of the County Court of the County of Peterborough, stating an address within the county, nor any other address of defendant where proceedings not requiring personal service might be left: that the person who acted as defendant's agent in serving the pleas was applied to to receive the joinder in issue, issue book, and notice of trial, on behalf of defendant, but refused to do so, and on this they were stuck up in the office of the Clerk of the County Court of the County of Peterborough.

The plaintiff's attorney, amongst other things, stated that when the writ was served on defendant, it was met by a demand of the plaintiff's residence, occupation, &c., and when the declaration was served a plea of fraud was put in: that Mr. Scott, of Peterborough, obtained a summons for leave to plead several pleas, and when they were served the plaintiff's attorney sent his clerk to serve the joinder of issue, issue-book, notice of trial &c., on Mr. Scott, and the clerk said he informed him he was directed not to receive any papers in the suit: that on the 27th April, 1869, he met Mr. Leys, the partner of the defendant, at Lindsay, whose name also appears on the back of the papers filed on this application, who enquired if they could not come to some settlement of the matter; to which he replied, he could pay the money, for the plaintiff had taken a verdict. Leys then said, "Is that the way you practice?" The plaintiff's attorney answered, "Yes, with men who try to take unfair advantage, as in this case." Leys then said, "I never was served with any notice of trial." The plaintiff's attorney said, "They were offered to your agent, Mr. Scott, who refused to receive them, and they were put up in

the clerk's office." Mr. Leys then said, "I must move to set aside the verdict": that finding no action had been taken to stay proceedings or set aside the verdict, he caused final judgment to be entered on the 5th of May.

The rule was enlarged until Easter term of last year, when *S. Richards*, Q. C., shewed cause. Under the Law Reform Act of 1868, O. 32 Vic. ch. 6, sec. 17, sub-sec. 4, judgment could be entered in County Court cases tried at the Assizes, as this was, on the fifth day after the verdict rendered, unless the Judge who tried the cause certified that the case ought to stand to abide the result of a motion in term, or unless a Judge of one of the Superior Courts should otherwise order. Here the defendant, through Leys, his partner, was aware on the 27th of April that a verdict had been taken for the plaintiff on the 20th April, and he took no steps to move against it or stay proceedings, though the plaintiff did not enter his judgment until the 5th of May. The appearance being in person, and no place or address in the county being given for the service of papers under the 131st rule of the county courts, similar to the 138th rule of this court, the papers were properly served by being put up in the office of the Clerk of the County Court. As to merits, they are not sufficiently disclosed; and if they are, they met not by the affidavits filed in answer.

M. C. Cameron, Q. C., contra. Under sub-sec. 5 of sec. 17 of the Law Reform Act, the application for a new trial in this cause is properly made to this Court, and is made, according to its practice, within the first four days of term. The plaintiff, by serving the declaration on defendant personally, waived his right to serve the remaining papers by putting them up in the Crown office, and they ought to have been served on him personally. *O'Neill v. Everett*, 3 P. R. 98 is a case in point, where the Court held the service by putting up in the Crown office bad.

RICHARDS, C. J., delivered the judgment of the Court.

This case was delayed for the purpose of obtaining a copy of the rules framed for the regulation of the County

Courts, to see if they differed as to the points taken in this case from those in force in the Superior Courts.

On referring to the rules made in 1857, as to Pleading and Practice in the County Courts, we find that Rule No. 131 is in terms the same as the rule of this Court 138, and is as follows :—"In all cases where the party sues or defends in person, he shall, upon issuing any writ of summons or other proceeding, or on entering an appearance, leave a memorandum with the clerk, who shall file the same as a paper in the cause, stating an address or place in the county within which the first process in the cause shall have been or shall be sued out, at which all pleadings, notices, summonses, orders, rules, or other proceedings, not requiring personal service, may be left; such address or place not to be more than two miles from such office; and if such memorandum shall not be left, or if such address or place be more than two miles from the office aforesaid, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, and other proceedings in such office." This rule seems to cover this case in terms.

Under the 52nd section of the Common Law Procedure Act, it is provided that "Every appearance by the defendant in person shall give an address, at which all pleadings or other proceedings, not requiring personal service, may be left for him; and if such address be not given the appearance shall not be received, and if an illusory or fictitious address be given, the appearance shall be irregular, and may be set aside by the Court or a Judge, and the plaintiff may by the Court or Judge be permitted to proceed by sticking up the proceedings in the office from whence the writ was sued out."

This section of the Common Law Procedure Act points out one mode of avoiding the irregular appearance by preventing it being received; and if an illusory address be given, when the appearance is otherwise regular, it makes it irregular, and permits it to be set aside; and that the plaintiff may be permitted to proceed by sticking up proceedings in the Crown office,

The rule of Court has also, we apprehend, the force of law in relation to the practice, and the two may well exist together.

The statute declares the appearance shall not be received unless it contain the address, and it is to be set aside when the illusory address is given.

Under the rule, if the defendant, on entering the appearance, does not leave the memorandum with the clerk, or if the place or address mentioned is more than two miles from the office, all pleadings for the party may be served by sticking the same up in the Crown office.

The defendant does not state in his affidavit that he was not aware that a notice of trial had been stuck up in the clerk's office, nor does he state he was lulled into security in consequence of its not being served personally, and therefore took no steps to put in a defence, nor does he state in his affidavit that he was misled thereby. He does not say he was not aware that the plaintiff was going on with his case at the Assizes, nor that he was not aware that a verdict had been taken. He merely says that he was informed a couple of weeks since (19th May) that judgment had been entered, a verdict having been taken, as he was informed, at the Peterborough Assizes. His information was prompt, for the judgment was entered on the 5th. Two weeks or fourteen days after would be the 19th, the day he made the affidavit, and he may have had equally prompt information as to the taking of the verdict.

The provision in the rule of Court as to serving papers by putting them up in the Crown office, is for the benefit of the party who does not make the default. If he chooses to serve any of the papers personally he may do so; but we fail to see how, if he does not choose to continue that practice, that the opposite party may say he is irregular in his proceedings, unless he can shew he has been deceived or prejudiced by the course taken.

This disposes of the first and second grounds of the rule, as to the regularity of the service, and the defendant being misled by the plaintiff having served the declaration in his

office, and the other papers by putting them up in the clerk's office.

The next ground is merits.

[The learned Chief here stated the contents of the affidavits on either side, upon which he considered that there was no sufficient ground for interference, and he then proceeded.]

But we do not see how we can get over the difficulty suggested, that the plaintiff has entered his judgment, and entered it after defendant had knowledge that the verdict had been recovered. He took no steps to prevent the plaintiff from entering his judgment; he allowed him to go on and incur further expense, relying apparently on his technical objection to the service of the notice of trial. It is very doubtful, even if the service of the notice of trial were irregular, if the defendant was not bound, when he could, to move against it before the plaintiff took another step. My impression is, that the authorities go to the length of holding that he was. But in the view we take of this case, he certainly was bound to stay the plaintiff's proceedings after having notice of the verdict, if he wished to move against it in term on the merits.

As *O'Neill v. Everett*, 3 P. R. 98, was referred to on the argument, it may be as well to point out how that case differs in some particulars from this. There the defendant had not entered an appearance, and his place of residence was unknown, and Rule No. 133 provides that where the residence of a defendant is unknown, pleadings, &c., may be stuck up in the proper office, "*but not without previous leave of the Court or of a Judge.*" That not having been obtained in that case, the service was deemed irregular. And in giving judgment in that case the following observation occurs, pointing to the distinction which exists between that case and this: "There is no pretence that the defendant himself appeared to the action, so as to justify the putting up of a copy in the Crown office at Belleville."

If the plaintiff was guilty of the fraud and misrepresen-

tation imputed to him, it is, I apprehend, a substantial ground of action, in which the now defendant might recover damages for any injury which he has sustained in consequence of acting on the false and fraudulent representation made to him with the intent that he should act on it.

It is possible that issue on the plea of fraud on this record being found for the plaintiff, it might be pleaded in bar to any action brought against him in this matter; and as the defendant has in fact not had that issue tried, it seems only reasonable that, if he desires it, it should be struck out of this record.

On the plaintiff filing a consent to allow the plea of fraud pleaded in this case to be struck out of the record, and taken off the files of the Court, this rule will be discharged.

Rule discharged.

FAUCITT V. BOOTH.

Slander—Justification—Evidence of malice.

In an action of slander for charging the plaintiff with perjury committed as a witness at a trial between defendant and another, the defendant pleaded and tried to prove a justification, but having failed in the attempt abandoned the plea. The jury were told that if defendant believed the charge to be true and acted *bonâ fide*, and did not make it before more persons or in stronger language than was necessary, they might consider the circumstances of the speaking, and entertain them as evidence to rebut the legal inference of malice. *Held*, there being no ground for saying that the communication was privileged, that this was misdirection.

Held, also, that the jury should have been told that they might consider the defendant's conduct in pleading and attempting to prove the justification, as some evidence of malice, and an aggravation of the injury.

THIS was an action of slander, tried at the last Owen Sound Assizes, before Galt, J. The words laid in the declaration were averred to have been spoken in relation to a trial between the defendant and another, on which the plaintiff was a witness, and were as follows: "William Faucitt swore lies in my^e case against Kerr; he perjured himself in

that case; I will stand to what I have said about William Faucitt; Faucitt did not say what was correct." Innuendo, that the plaintiff had committed perjury.

Pleas: not guilty; and a justification, that the plaintiff at the trial in question had committed perjury.

On the trial the words were proved as laid, and for the defence the defendant and other witnesses were examined, to establish the plea of justification; but the defence having in that respect failed, at the close of the case the defendant's counsel abandoned the plea.

The learned Judge in his charge told the jury that they should be satisfied that the words spoken were spoken maliciously: that the charge implied malice, and that it was for the defence to rebut the legal inference: that if the defendant believed the charge to be true, and acted *bonâ fide*, and did not make it before more persons or in stronger language than necessary, the jury might consider the circumstances of the speaking, and if they thought the defendant acted in good faith, they might entertain them as evidence to rebut the legal inference of malice.

The charge was objected to, and there was a verdict for the defendant.

During this term, *J. K. Kerr* obtained a rule *nisi* for a new trial, among other grounds, for the rejection of evidence in directing the jury not to consider the plea of justification as evidence of malice, and on the ground of misdirection.

During the same term, *Harrison*, Q. C., shewed cause. All the circumstances here shewed that at most the plaintiff should have recovered only nominal damages, and there should therefore be no new trial: *Barton v. Thompson*, 2 Burr. 664; *Harris v. Jones*, 1 Moo. & Rob. 173; *Browne v. Gosden*, 1 C. B. 728; *Sherwood v. Gibson*, 5 U. C. R. 205; *Curtis v. Jarvis*, 10 U. C. R. 466. As to the effect of the plea of justification and the abandonment of it, in *Warwick v. Foulkes*, 12 M. & W. 507, and *Simpson v. Robinson*, 12 Q. B. 511, it is intimated that justifying may afford evidence of malice; but in *Wilson v. Robinson*, 7

Q. B. 68, it was held otherwise. Misdirection, such as is alleged here, is not necessarily ground for a new trial, where the verdict is in other respects satisfactory: *Edmondson v. Machell*, 2 T. R. 4; *Connell v. Cheney*, 1 U. C. R. 307; *Moore v. Tuckwell*, 1 C. B. 607. The circumstances under which the words were spoken, relating to a trial in which the defendant was an interested party, protected them as a privileged communication in the absence of express malice: *Blackham v. Pugh*, 2 C. B. 611; *Bennett v. Deacon*, 2 C. B. 628; *Amann v. Damm*, 8 C. B. N. S. 597; *Jackson v. Hopperton*, 16 C. B. N. S. 829.

Kerr supported the rule. *Starkie* on Slander, 3rd ed., 463; *Warwick v. Foulkes*, 12 M. & W. 507; and *Simpson v. Robinson*, 12 Q. B. 511, shew conclusively that a justification is evidence of malice, upon the same principle as repetitions of the charge—*Defries v. Davis*, 7 C. & P. 112—and publications after issue joined—*Macleod v. Wakley*, 3 C. & P. 311—have been admitted for the same purpose. See also *Townshend* on Slander and Libel, 478, 484; *Starkie*, 466–8; *Chubb v. Westley*, 6 C. & P. 436; *Barwell v. Adkins*, 1 M. & G. 807; *Plunkett v. Cobbett*, 5 Esp. 136; *Pearson v. Lemaitre*, 5 M. & G. 700; *Hemmings v. Gasson*, E. B. & E. 352. *Wilson v. Robinson*, 7 Q. B. 68, is plainly distinguishable. It was held there that the jury in deciding, upon the issue on Not Guilty, whether the communication was privileged, should not consider the fact that a justification had been pleaded and abandoned; but it was conceded that it might have furnished evidence of malice in aggravation of damages. There was no ground in this case for saying that the communication was privileged.

MORRISON, J., delivered the judgment of the Court.

Upon an examination of the evidence given on the trial we see no pretence for saying that the words spoken by defendant were privileged communications, or that there was any thing in the occasion on which they were spoken to constitute them privileged. We therefore cannot acquiesce in the direction of the learned Judge. The words and

charges were not spoken or made by the defendant in the prosecution of any inquiry or in the discharge of any public or private duty, so as to rebut the inference of malice which the law draws from unauthorized communications, such as in the case of *Padmore v. Lawrence*, 11 A. & E. 380, upon the authority of which the learned Judge apparently acted.

Then as to the rejection of evidence, and the learned Judge directing the jury not to consider the plea of justification as evidence of malice. It appeared that after the defendant and other witnesses were examined in support of the plea and the plea given up, the defendant's counsel consenting to a verdict being entered on it for the plaintiff, the learned Judge told the jury to dismiss it from their consideration altogether.

In the case of *Warwick v. Foulkes*, 12 M. & W. 507, which was an action for causing the plaintiff to be taken to a police office on a charge of felony, there was a plea of justification that the plaintiff had feloniously stolen certain goods. At the trial, the defendant's counsel stated he should not offer evidence in support of the plea. Then the learned Judge told the jury that although the plea had been explained and apologized for, still the putting the plea upon the record was a matter to be taken into account in estimating the damages; and on motion being made for a new trial, on the ground of misdirection, that the plea being abandoned the learned Judge ought to have told the jury to pay no regard to it, Lord Abinger, C. B., in giving judgment, in refusing the rule, said: "I think the learned Judge was right. The putting this plea on the record is, under the circumstances, evidence of malice, and a great aggravation of the defendant's conduct, as shewing an animus of persevering in the charge to the very last."

And in *Simpson v. Robinson*, 12 Q. B. 511, a case of slander, and a justification alleging the truth of the words, the defendant offered no proof of the plea, and did not abandon it, and the plaintiff expressed his willingness to accept an apology and nominal damages. This the defend-

ant refused. Erle, J., before whom the case was tried, remarked, in reference to the question of malice, that the whole of the defendant's conduct might be considered by the jury; and with reference to the question of damages, that the jury should consider the nature of the imputation, how it had been made, and how it had been persisted in down to the time of the verdict. On a motion for a new trial for misdirection, Lord Denman, in giving judgment refusing a rule, said: "We see no objection to this direction. The defendant's conduct in putting a justification on the record, which he does not attempt to prove, and will not abandon, may be taken into consideration as proving malice and aggravating the injury."

In the present case the plea of justification was persisted in, and was not abandoned until after the defendant and witnesses called by him were examined and failed to prove it. We therefore think, on the authority of the cases referred to, that the plaintiff was entitled to have had the jury told that they might consider the defendant's conduct, in putting the plea of justification on the record and endeavoring to prove it, as some evidence of malice and aggravation of the injury.

The rule must be absolute for a new trial without costs.

Rule absolute.

IN RE THE JUDGE OF THE COUNTY COURT OF YORK.

Division Courts.

No person except a barrister or attorney duly qualified is entitled to prosecute or defend suits in the Division Courts.

THIS was an application made by and on behalf of *Robert M. Allen*, a barrister, calling upon the Judge of the county of York, and the junior Judge of the same county, to shew cause why a writ of prohibition should not issue commanding them to refuse audience to one Joseph Cupples

and one G. D. James, and others, in the conducting or defending the causes of suitors in the Division Court of the county of York.

The application was based on an affidavit of Mr. Allen that the persons named, and others, were in the habit of attending the First Division Court of the county of York, and acting as advocates, contrary to law, in prosecuting and defending cases, examining witnesses, &c., to the injury of the members of the bar and attorneys, and to the detriment of the general public: that he, Mr. Allen, frequently objected to such unprofessional persons being so engaged: that the same was brought under the notice of the said Judge and the junior Judge, accompanied by a memorial numerously signed by both branches of the profession in the city of Toronto, praying that such unprofessional persons should not be recognized or permitted to act as advocates in the Division Courts, without effect, and that the persons named in the rule would continue to act as such advocates unless prevented by judicial authority.

During this term, *C. S. Patterson* shewed cause, referring to *In re Lapenotiere*, 4 U. C. R. 492.

Allen supported his rule.

The statutes cited are referred to in the judgment.

MORRISON, J.—Mr. Patterson took several preliminary objections to the form of the application and the grounds of motion. We do not think it necessary in this case to consider these objections, as the object of this application was to obtain the opinion of the Court upon the right of persons not being barristers or attorneys to practise in the Division Courts in the prosecuting and defending of suits.

Mr. Patterson referred us to several sections of the Division Courts Act, Consol. Stat. U. C., ch. 19, as indicating that unprofessional persons were not prevented from conducting causes in those courts. We find that in the 84th section it is enacted, "On the day named in the summons the

defendant shall, in person, or by some person on his behalf, appear in the Court to answer, and on answer being made the Judge shall, without further pleading or formal joinder of issue, proceed in a summary way to try the cause," &c. And in the 106th section it is stated, "The Judge, in any case heard before him, shall openly in Court, and as soon as may be after the hearing, pronounce his decision; but if he is not prepared to pronounce a decision *instantly*, he may postpone judgment, and name a subsequent day and hour for the delivery thereof in writing at the clerk's office; and the clerk shall then read the decision to the parties or their agents, if present." And by the 109th section, "The Judge may, with the consent of both parties to the suit, or of their agents," refer the matters in dispute to arbitration. And in the 114th section it is provided, that "in cases where the plaintiff does not appear in person, or by some person on his behalf," &c., the Judge may award costs to the defendant, &c. And by the 139th section the clerk shall, "upon the application of any plaintiff or defendant (or his agent) having an unsatisfied judgment in his favor," prepare a transcript of such judgment, and shall send the same to the clerk of any other Division Court, &c.

These are all the sections of the Act which contain any expressions referring to agents or persons acting on behalf of suitors.

Now, with reference to the 106th and 139th sections, we see no reason, from the very nature of these provisions, that the persons who may attend in the one case, or make the request in the other, need be barristers or attorneys; but with respect to the other sections, they appear to us to have relation to persons who are duly authorized to practise as barristers and attorneys in Her Majesty's Courts, particularly when we come to consider the provisions of the statute respecting Barristers-at-Law, ch. 34, Consol. Stat. U. C., and that respecting Attorneys-at-Law, ch. 35 of the same statutes, the former passed many years before the Division Courts Act, and the latter several

years after; and it seems to us clear that no person can solicit or defend any action or suit in Division Courts other than barristers or attorneys duly qualified.

The first section of the Act respecting barristers enacts that only certain persons, and no others, may be admitted to practise at the Bar in Her Majesty's Courts of Law and Equity in Upper Canada. The effect of this statute was much discussed in the case *In re Lapenotiere*, 4 U. C. R. 492, the question in that case being whether an attorney was entitled to be heard as an advocate in the then District Courts, which had not a jurisdiction as extensive as the Division Courts; and the majority of the Judges of the Court held that attorneys could not be heard, by reason of the statute 37 Geo. III., ch. 13, which is consolidated by Consol. Stat. U. C. ch. 34. Macaulay, J., in giving judgment, says, "The statute enacted that no person (subject to certain exceptions, not including attorneys), should be permitted to practise at the Bar of any of His Majesty's Courts * * * It does not appear to me that an attorney not a barrister can as of right claim to be heard as an advocate in the District Courts, in the face of this express prohibition, if such Courts come within the denomination of 'any of His Majesty's Courts in this province.' All Courts of Record are the King's Courts, and the statute 8 Vic., ch. 13, creating the present District Courts, establishes them as courts of law and record; and sec. 48 empowers them to fine and imprison."

Now, by 32 Vic., ch. 23, sec. 1, statute of Ontario, all judgments in the Division Courts shall have the same force and effect as judgments of Courts of Record, which is, in other words, constituting them Courts of Record; and they have, by the 182nd section of Consol. Stat. U. C. ch. 19, power to fine and imprison,

But when we come to look at the Act respecting attorneys, passed several years after the passing of the Division Courts Act, the language of that statute is so clear that there is little room to doubt as to the intention of the Legislature as expressed in the first section, which enacts,

“Unless admitted and enrolled, and duly qualified to act as an attorney or solicitor, no person shall, in Upper Canada, act as an attorney or solicitor in any Superior or Inferior Court of civil or criminal jurisdiction in law or equity, or any Court of bankruptcy or insolvency, or before any Justice of the Peace, or as such sue out any writ or process, or commence, carry on, solicit or defend any action, suit or proceeding in the name of any other person, or in his own name.” These words are as large and wide as they possibly can be made, and, as indicating the comprehensiveness of the intention of the Legislature, unprofessional persons are prohibited from soliciting or defending any proceeding before a Justice of the Peace. It has been suggested that, as there were no pleadings in the Division Courts, there was no necessity for the services of a professional gentleman, and that any person might act for another in cases in those Courts. The same observation might be applied to proceedings before a Justice, but we see the Legislature expressly prohibiting the employment of unqualified persons in such cases; and it may be suggested as a stronger reason why such a rule should prevail in Division Courts, that the cases in those Courts may be tried by a jury at the request of either of the parties.

On the whole, from the express language used by the Legislature in the statutes referred to, we think it is manifest that the Legislature intended that only barristers and attorneys should be authorized to conduct or carry on, in any Court, any kind of litigation, and that, consequently, unprofessional persons are not entitled to have audience in the prosecuting or defending suits in the Division Courts.

As this rule was granted for the purpose of hearing the point discussed, and an expression of the opinion of the Court, we assume that it will not be necessary any further step should be taken.

WILSON, J.—The Attorneys’ Act is very direct and positive in its terms, and prohibits any one from acting as an

attorney or solicitor, unless he has been duly admitted, enrolled, and qualified.

The Barristers' Act, Consol. Stat. U. C. ch. 34, is differently worded. It declares that "The following persons, and no others, may be admitted to practise at the Bar in her Majesty's Courts of Law and Equity in Upper Canada." And it provides the class of persons who shall be so admitted.

The expression *admitted* in that Act appears to me rather to mean who shall be admitted to the Bar, that is, by the Law Society to practise at the Bar. Section 1 of ch. 33 provides that the Law Society and the Benchers thereof shall have the power "to call and *admit* to the practice of the law as a barrister, any person duly qualified to be so *admitted*," &c. And the term appears to be used in that sense throughout chapter 34.

The 37 Geo. III. ch. 13, sec. 5, which has been consolidated by ch. 34, sec. 1, enacted "that no person other than the present practitioners, and those hereafter mentioned, shall be *permitted* to practise at the Bar of any of His Majesty's Courts in this Province," &c. And when the word *admitted* is used in that Act, it is used with reference to the admission of the person into and by the Law Society.

The word *admit* has not quite the same signification as *permit*. The Law Society may *admit* into its body those gentlemen who are to practice at the bar. The law does not, or the Judge or other judicial person presiding for the time being shall not, permit any one who has not been so admitted to practise at the Bar.

It may therefore be, notwithstanding this Act, that a Judge might in case of great necessity permit persons who were not barristers to act before him. It is certainly within the power of English Courts to allow such persons to act as counsel in the matters before them as they please: *The Serjeants'* case, 6 Bing. N. C. 187, 232, 235; *Collier v. Hicks*, 2 B. & Ad. 663. And it is said in Roger North's *Life of the Lord Keeper Guilford*, that when the Serjeants of the Common Pleas would not move when called on, having taken offence at some action of the Court which interfered

with their monopoly, the Chief Justice said to the attorneys who were present, "and do you attorneys come all here to-morrow, and care shall be taken for your dispatch; and, rather than fail, we will hear you, or your clients, or the barristers-at-law, or any person that thinks fit to appear in business, that the law may have its course." See also *Campbell's Lives of the Chancellors*, vol. iii., p. 361.

It can only be a case of great necessity which will warrant a departure from the general, approved, and settled practice of the Courts. The policy of the Legislature on this subject has plainly been to exclude all unqualified and non-professional practitioners, and Judges should give effect to that legislation. In *Tribe v. Wingfield*, 2 M. & W. 128, it was said by the different Judges "they could never lend their authority to support the position, that a person who was neither a barrister nor an attorney might go and play the part of both; and that in such a case there was none of that control which was so useful where counsel or attorneys were employed." It is, however, clear law that "any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice:" *Collier v. Hicks*, 2 B. & Ad. 662, 668.

I agree in the conclusion my brother Morrison has expressed. The rule will be absolute; but it is not to be taken out of the office without the further order of the Court.

RICHARDS, C. J., concurred.

Rule absolute.

IN RE HUTCHISON AND THE BOARD OF SCHOOL TRUSTEES
OF ST. CATHARINES.

Colored people—Right of admission to Schools—Mandamus.

In answer to an application for a mandamus to the School Trustees of a town to admit the applicant's son, a colored boy, to the public school in his ward, it was sworn that since 1846 a school had been set apart for the colored inhabitants, and that the school to which admission was desired was overcrowded, and had no room for any additional children. There was, however, no separate school legally established for colored people, the Act authorizing such schools being passed after the setting apart of the school above mentioned.

Held, that on the ground only of want of accommodation the writ must be refused; but as admission had been refused on account of the boy's color, the trustees were ordered to pay the costs of the application.

Harrison, Q. C., obtained a rule calling on the Board of School Trustees of the Town of St. Catharines, and the teacher of the public school in St. George's Ward in the said town, to shew cause why a writ of mandamus should not issue, commanding the said Board of School Trustees and the teacher to permit Richard Hutchison, the son of the applicant, aged 13 years, to attend the said public school, so long as he conduct himself in conformity with the rules of such school, and the fees and rates required to be paid on his behalf are fully discharged, the said Richard Hutchison being a colored resident in the said ward, and there being no separate school for colored persons established in the said town, according to the act respecting the establishment of separate schools; and on grounds disclosed in affidavits and papers filed.

The application was based on an affidavit of the applicant, stating that he was a negro and a British subject, a resident of St. Catharines for upwards of fifteen years: that he had a son, Richard Hutchison, aged 13 years: that on the 29th of January last he took his son to the common school in St. George's Ward in said town, in which ward his family resides, and applied to the teacher for the admission of his son: that the teacher refused to admit his son, on the ground of his color: that the Board of School Trustees of

said town also refused to admit his son on account of his being a colored child and the son of a negro: that there is no separate school for colored children in the said town established according to law: that himself and all other colored persons owning or occupying property in said town have been assessed and taxed for the ordinary common schools: that some years ago the Board of School Trustees opened a school in St. Paul's Ward, to which they desired all colored children in the town to go, and have kept it open under the control and management of the Board: that such school has never had any trustees elected for its management, nor have the colored people of the town been directly taxed for the support of such school. And he further stated that for some time past one or more colored children had been admitted into and educated in one of the common schools of the said town.

Affidavits were also filed of a refusal on the part of the trustees and the teacher on the ground of the boy's color; and also an affidavit stating that the trustees for some years past set apart a school in Geneva street, in the said town, for educating colored children attending any of the other schools.

Osler shewed cause, filing affidavits in reply. These affidavits set out, among other matters, that in 1845 or 1846, the colored people of the Town of St. Catharines petitioned for a separate school for colored children: that the then district council passed a by-law setting apart the colored people of the town into a separate school division: that a colored teacher was appointed to it, and that the school has always been kept open and maintained for the colored people, and that it is conveniently situated for the colored population, and within a short distance of St. George's Ward, in which the applicant resides: that the school was well patronised by the colored people, and until a few months ago they were generally satisfied with it: that all the schools are at present overcrowded: that the trustees were compelled to hire rooms for the

children, and which rooms are now also overcrowded. It was sworn to by one of the trustees that the St. George's Ward School, into which the applicant desired his son to be admitted, was so much overcrowded that there was not room for any additional children.

The affidavit of the Chairman of the Board stated that if the school set apart for the colored children be closed and the children forced into the other schools, it would endanger the health of the children from their overcrowded state; and he also stated that the present Board of Trustees had acted in good faith as regards the said school, and had only continued the arrangements made by their predecessors in office.

The Local Superintendent of Schools, who was also a physician, stated in his affidavit that the compelling the trustees to admit the colored children of the town into the several ward schools at the present time would be attended with evil consequences from a sanitary point of view.

Osler, in shewing cause, contended that the trustees might say that the colored children should attend one particular school, referring to Consol. Stat. ch. 64, sec. 79, sub-sec. 8, and that in this case the mandamus should at all events not be granted, it being shewn that there was no room in the school to which admission was desired.

Harrison, Q. C., supported the rule, citing *Washington v. School Trustees of Charlottesville*, 11 U. C. R. 569; *Hill v. School Trustees of Camden, Ib.*, 573; *In re Ridsdale and Brush*, 22 U. C. R. 122; Consol. Stat. U. C. ch. 64, sec. 27, sub-sec. 16; ch. 65, sec. 1; O. 32 Vic. ch. 44; 34 Vic. ch. 33, sec. 23.

MORRISON, J., delivered the judgment of the Court.

On the argument it was conceded that in the Town of St. Catharines there was no separate school established for colored people, the school that was opened and set apart in 1845 or 1846 being so set apart before the passing of any of the Acts on the subject of separate schools, so that

we have to deal with the case irrespective of the statute authorizing the establishment of separate schools. Our school law in such a case makes no distinction in respect of color or otherwise as to the children entitled to be admitted into the public schools, the general principle upon which they are based being that they shall be open to all children upon the same footing, and trustees have no authority to make any distinction between colored and other children when no separate school is established for the children of the colored inhabitants : *Washington v. School Trustees of Charlotteville*, 11 U. C. 569.

Sec. 27 of the School Act, sub-sec. 16, enacts that it shall be the duty of the trustees to permit all residents in each section, between the ages of five and twenty-one years, to attend the school, &c.; but such permission shall not extend to the children of persons in whose behalf a separate school has been established, according to the act respecting the establishment of separate schools. This section defines the powers and duties of trustees in townships, but the 79th section, which declares the duty of the boards of trustees for towns, &c., after setting out various duties specifically applicable to them, by the 18th section enacts that they shall exercise as far as they judge expedient in regard to their city, town, or village, all the powers vested in the trustees of each school section in regard to such school section, and which includes the provisions of sub-sec. 16 of sec. 27.

On the part of the trustees it was pressed, that as a school was set apart some twenty-five years ago at the instance of the colored people of St. Catharines, and which school is still maintained, and as there was accommodation there for this colored boy, this application ought to be refused. We see no reason why, because the applicant's son happens to be colored, that on that account he should be refused admittance to a common school situate in the ward in which his family resides, and most convenient for his child to go to, upon the same terms as his neighbors' children, and that he should be restricted to one school

where only colored children are taught. If it appeared clear, or if it was admitted, that in the school in question in St. George's Ward there was accommodation for the applicant's son, we should be of opinion that the rule should be made absolute, as we think it would be the duty of the board and the teacher to admit and receive the boy into the school; and the only ground upon which a refusal to admit the boy can be justified is that which appears in the affidavits filed: viz., that the school in question is at present overcrowded, so that there is not room for additional scholars.

During the argument we were referred to sec. 79, sub-sec. 8, and also to the letter of the Deputy Superintendent of Education attached to the affidavit of the Chairman of the Board of Trustees (a). We cannot entertain any doubt that the Legislature never intended by the expression "kind" of schools used in that sub-section to mean or provide that the trustees could determine that in any particular school only children of color or any particular race should be admitted. If so, then upon the same reasoning the trustees might order that in certain schools none but natives of Scotland or Ireland, &c., or the children of parents of such and such religious sects, should be educated in certain schools, a system and powers totally at variance with the principles upon which our common school legislation is founded. We read the words "kind and description of schools," as used in that sub-section, as being more applicable and as referring to the plan and materials upon and of which the schools may be constructed. As to kinds of schools in the other sense, there can be only two kinds, as for boys and girls, and sec. 27 sub-sec 6, provides for the establishment of both.

On the whole, we are of opinion that, as it is sworn that

(a) This was a letter addressed to the chairman, referring to sec. 79, sub-sec. 8, and intimating that the right to establish any "kind or description of schools" implied the right to determine who should attend them, otherwise particular schools in the town might be crowded to excess and others deserted.

there is not accommodation for the applicant's son in the school in question, the rule must be discharged, but on that ground only; and as the applicant has substantially succeeded in his motion, the admission of the boy to the school being refused on account of his color, which was not denied, but rather justified, and not for the reason of want of accommodation, the applicant is entitled to the costs of this application, which we order to be paid by the Board of School Trustees.

Rule discharged.

CAMPBELL, ASSIGNEE OF WILLIAM CHALMERS,
AN INSOLVENT, v. BARRIE.

Insolvent Act of 1869, sec. 89—Sale within thirty days—Pressure.

Under sec. 89 of the Insolvent Act of 1869, the presumption that transactions within thirty days next before the assignment, &c., were made in contemplation of Insolvency, is not conclusive, but may be rebutted. In this case the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for \$900, of which \$400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in, and on the 9th he purchased from the insolvent about \$1,400 worth of pork, on condition that \$600 should go upon the mortgage, and he paid the balance of the purchase money to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought this suit against the creditor to avoid the transaction. The creditor said he did not wish to press the debtor in any way, but wanted his money. The debtor owed about \$3000, and his property produced only \$1,000. There was contradictory evidence as to defendant knowing or having probable cause for believing that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favor of the defendant, the creditor, the Court held that the transaction was not avoided by force of the statute; and upon the facts they refused to interfere.

Held, also, that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases.

DECLARATION.—First count: That the insolvent within thirty days next before the issue of the writ of attachment in insolvency, being indebted to defendant, did, in contem-

plation of insolvency, give to defendant by way of payment certain goods and chattels, whereby defendant obtained an unjust preference over the other creditors of the insolvent: that the defendant afterwards sold the goods and chattels, and the plaintiff, as assignee, elected to avoid the payment made by the insolvent to defendant, and demanded of the defendant the money received by him for the goods. Averment of general performance; yet that defendant had not given or paid to the plaintiff the said money, or any part thereof.

Second count: alleging payment in money by the insolvent to defendant of \$609 on account of debt, within thirty days next before the issuing of the writ of attachment, the insolvent being then unable to meet his engagements in full, and the defendant then knowing such inability, or having probable cause for believing it to exist; and that no valuable security was given up in consideration of such payment, and the plaintiff as assignee elected to avoid such payment, &c.

3. Trover, for conversion, before insolvent was divested of his estate, of goods then the property of the insolvent.

4. Trover, for converting goods of the plaintiff as official assignee.

5. Common counts, for goods sold, &c., by insolvent to defendant.

6. Common counts, for goods sold, &c., by the plaintiff, as assignee.

Pleas: 1. To the first count, that the insolvent did not, in contemplation of insolvency, give to defendant goods by way of payment, whereby defendant obtained an unjust preference, &c.

2. To part of the second count, that the insolvent did not pay to defendant \$609.

3. To the residue of the second count, that the defendant did not know at the time of the alleged payment of the inability of the insolvent to meet his engagements in full, nor had he probable cause for believing the same to exist.

4. To the third and fourth counts, not guilty.

5. To the fourth count, that the goods were not the goods of the plaintiff as assignee.

6. To the fifth count, never indebted to the plaintiff as assignee.

7. To the fifth count, payment to the insolvent before insolvent was divested of his estate.

8. To \$63, parcel of the money claimed in the sixth count, payment of that sum into Court.

9. To the residue of the sixth count, never indebted.

Replication: Issue on all pleas but the eighth, and as to the eighth plea, acceptance of the sum paid.

The cause was tried at the Fall Assizes, at Perth, before Hagarty, C. J. C. P., and a jury.

It appeared the writ of attachment was issued on the 3rd of March, 1870. The insolvent owed about \$3000. He kept a general store. His whole estate produced \$1000. He lived about twenty miles from Perth, and defendant lived in Perth. "About ten days before the attachment," the plaintiff said, "I had heard rumours of Chalmers's insolvency, and I was asked several times in about ten days before the attachment, both in Perth and in the country, if Chalmers had made an assignment. Before the attachment defendant asked me if it would be safe for any person to purchase pork, and apply it on a mortgage from a man if he were in trouble. I thought it was safe, if he knew nothing of the man being in trouble. He mentioned no names. That was about ten days before the attachment." Defendant's mortgage on Chalmers's store was produced, dated 4th of March, 1867, for \$900. "The property might bring \$850. Defendant told me he had got 75 barrels of pork and 10 barrels of beef from Chalmers. A demand was made on him for it. I found letters among Chalmers's papers (he is dead) from creditors asking for payment. Defendant told me the price of the pork and beef was about \$1400. The sum of \$609 was applied on the mortgage. There was a note in the bank made by Chalmers, endorsed by one Dunlop, which defendant paid.

There was still \$400 due to Chalmers, for which defendant gave four promissory notes for \$100 each. I think the notes were dated 15th of February, 1870. Defendant is a hotel keeper and butcher. It was after I heard the rumors of Chalmers's insolvency that I heard of defendant buying the pork. I think Chalmers has been insolvent since the fall of 1869."

Jane R. Chalmers, a daughter of the insolvent, who attended in her father's store, said she wrote a letter of the 14th of February, 1870, put in, (relating to other matters,) and that it was after that letter was written her father sent the pork and beef to defendant.

John Downing said, I live about three miles from Chalmers; knew him well; had dealings with him; he owed me about \$70; in February last his position was supposed to be good.

Defendant's letter of the 8th of February, 1870, to Chalmers was read, as follows:—

"SIR,—As you have not been to Perth for some time, I wish you would call and arrange matters first time you are in."

For the defence, evidence was given that the land, without the store, was worth about \$400; that the buildings cost about \$1,200, and that the whole place would be worth \$1,200.

Thomas Dunlop said: I thought Chalmers was in the best of circumstances at the time of the sale of the pork; I lived near him; endorsed a note for \$400 for him; he agreed my note was to be paid out of the pork; it could not be sold without paying me; did not know what might happen, and wanted security; did not expect anything was going to happen; defendant paid my note on the 22nd February; two days after that it was talked about that the money would have to be paid back, that Chalmers was not all straight, and I asked plaintiff, without mentioning names, if I would have to pay back.

Defendant was called. He said: I offered Chalmers \$19 a barrel for the pork, if he would let \$600 go on the mortgage; he agreed; never heard any rumor of his

insolvency. After I got the pork I heard rumors of his insolvency. I bought the pork on the 9th February; he delivered it on the 13th or 14th February; heard nothing against his credit till nearly a fortnight after I had bought the pork; I received about \$40 for the pork more than I gave; the \$63 paid into court was for the beef; Chisholm sent me six barrels of the beef to sell for him; I did not want to push the man in any shape; I wanted the money.

The learned Chief Justice stated to the jury that it appeared that only two instalments of the mortgage, or \$400, were due, not \$600, at the time of the purchase by the defendant of the pork; the third instalment was not due till the following month: that he saw no evidence of actual pressure of the insolvent by defendant; but that a *bonâ fide* demand of the debt without suit had been held to be sufficient to protect the transaction from the stain of being a fraudulent preference: that here the whole transaction was within the thirty days, and the law presumed the act done within that time to have been done in contemplation of insolvency: that the only impeachable part of the transaction was the application of the money to pay the antecedent debt, part of it being in fact not then due; if the transaction had been outside of the thirty days it would have been supportable. He read the clause to the jury, and he told them what the law presumed, and the mischief it intended to provide against, and that there was evidence to warrant the belief that Chalmers was insolvent when he sold the pork.

The plaintiff's counsel contended that the presumption arising against transactions had within the thirty days could not be rebutted. The learned Chief Justice said: "I did not so rule in terms; but I did say that a creditor *bonâ fide* pressing for payment, having no reason to expect insolvency, might be protected under the authorities. It is wrong in point of law, if I should have told the jury that the transaction having taken place within the thirty days, was conclusively avoided by the statute."

The jury found a verdict for the defendant.

In Michaelmas Term last, *S. Richards*, Q. C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, on the ground that it was contrary to law and evidence, and for the misdirection of the learned Chief Justice, in leaving it to the jury to say whether the goods were given or delivered to the defendant in contemplation of insolvency, instead of directing them that as such delivery was within thirty days next before the issuing of the writ of attachment, it must be presumed to have been in contemplation of insolvency.

In this term, *Harrison*, Q. C., shewed cause. There was no misdirection. It is a presumption only that acts done within the thirty days are void: *Newton v. The Ontario Bank*, 13 Grant 659. This was not a transaction within the 89th section of the Insolvent Act of 1869. The defendant was a purchaser of the pork, and it was not a sale in contemplation of insolvency, nor by way of security. The pork was not given by way of payment; but if it were, it was not to obtain an unjust preference. The fact that part of the price of the pork was to be applied in reduction of an old debt did not necessarily avoid the transaction: *Bell v. Simpson*, 2 H. & N. 410. The defendant reduced the charge under his mortgage on the insolvent's land by just as much as he applied of the price of the pork upon the mortgage; there was nothing unjust in that. There was no evidence that defendant knew of the insolvent's inability to pay his debt, or that he had reason to believe it; the evidence was to the contrary. He referred to the following cases: *Whitmore v. Dowling*, 2 F. & F. 134; *Pennell v. Reynolds*, 11 C.B.N.S. 709; *Mercer v. Peterson*, L.R. 2 Ex. 304; S. C. in Ex. Ch. L.R. 3 Ex. 104; *Gottwalls v. Mulholland*, 15 C.P. 62; S. C. 3 E. & A. Rep. 194; *Adams v. McCall*, 25 U. C. R. 219; *Hersee v. White*, 29 U. C. R. 232; *Robson's Bank. Law*, 110; *McWhirter v. Thorne*, 19 C.P. 308; *Mathers v. Lynch*, 27 U. C. R. 244; S. C. 28 U. C. R. 354; *City Bank v. Smith*, 20 C.P. 93.

S. Richards, Q. C., supported the rule. The facts of the case are very strongly against the defendant as to his

knowledge of Chalmers's inability to meet his engagements, or that he had probable cause for believing him to have been insolvent when he bought the pork from him. The defendant obtained an unjust preference, and there was no degree of pressure to prevent the Act having been done in contemplation of insolvency. But, on the law, it is quite plain that if the presumption to avoid transactions which have been had within thirty days is to be submitted to the jury as a matter to be rebutted or affirmed, and is not to be treated as a conclusion which cannot be repelled, there is no force and but very little use in the statute: *Nunes v. Carter*, L.R. 1 P.C. 342; *Churcher v. Cousins*, 28 U.C.R. 540.

WILSON, J.—Before the legal question can be stated, it must first be ascertained what the meaning of the 89th section of the Statute is.

It provides—32-33 Vic. ch. 16, sec. 89,—that “if any sale, * * be made of any property real or personal by any person in contemplation of insolvency, by way of *security* for payment to any creditor; or if any property * * be given by way of *payment* by such person” (*i. e.*, by any person in contemplation of insolvency) “to any creditor, whereby *such* creditor” (*i. e.*, the creditor who gets property either by way of security for payment or by way of payment) “obtains or will obtain an unjust preference over the other creditors, such sale * * shall be null and void. * * And if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under this Act, it shall be presumed to have been so made in contemplation of insolvency.”

There are two things necessary to concur to make the sale, &c., null and void under this section: firstly, that it be made by a person in contemplation of insolvency; and secondly, that it be made to a person who does thereby obtain or will obtain an unjust preference over the other creditors.

In a certain event, that is, if the sale, &c., be made within thirty days next before the deed of assignment or writ of

attachment, the sale, &c., shall be presumed to have been so made "in contemplation of insolvency."

The Act does not say that if the sale, &c., be made within the thirty days it shall be void, nor does it say that it shall be presumed the creditor has obtained or will obtain an unjust preference, but merely that it shall be presumed the sale was made "in contemplation of insolvency."

Doing an act in contemplation of insolvency is an expression which is used in opposition to doing it in course of trade: *Alderson v. Temple*, 4 Burr. 2240.

The giving of a security to a creditor by way of preference is not void by the Bankrupt Act, unless it be given in contemplation of bankruptcy: *Wheelwright v. Jackson*, 5 Taunt. 109.

"Two things are necessary to concur in order to avoid the delivery of the goods: namely, the purpose of voluntary preference in respect to such delivery, and the contemplation of bankruptcy at the time when the goods were delivered": *Crosby v. Crouch*, 11 East 256, 260.

"To make the deposit void two things must concur: it must have been made by the bankrupt voluntarily," (giving, as the facts shew, a preference,) "and also in contemplation of bankruptcy": *Morgan v. Brundrett*, 5 B. & Ad. 289, 296. In the last case Parke, J., said, "The meaning of those words (in contemplation of insolvency) I take to be, that the payment or delivery must be with the intent to defeat the general distribution of effects which takes place under a commission of bankrupt."

Brown v. Kempton, 19 L. J. N. S. C. P. 169, also shews that the debtor paying voluntarily and with a view of giving a preference to the creditor in the event of a bankruptcy, the payment will be void. See also *Groom v. Watts*, 4 Ex. 727.

In *Atkinson v. Brindall*, 2 Bing. N. C. 225, it is said, when a trader "contemplates bankruptcy and the protection afforded by the bankrupt laws, a disposition of property made with a view to defeat the equal distribution provided by those laws is fraudulent and void."

An act will not be deemed to have been done in contemplation of bankruptcy if the act were done to avoid being made a bankrupt. It is a question of fact: *Gibson v. Boutts*, 3 Scott 229; *Abbott v. Burbage*, 2 Bing. N. C. 444.

In *Bills v. Smith*, 11 Jur. N. S. 155, 156, the jury were told, "that if the payment were in contemplation of bankruptcy, and voluntary, they ought to infer it was intended to prevent the equal distribution of the property amongst the general creditors, in which case it would be void."

In *re Inns of Court Hotel Co.*, L. R. 6 Eq. 90, it is said, "it is not every act of the Company which will amount to a fraudulent preference. There must be a contemplation of bankruptcy, that is to say, of a winding-up; and there must be absence of pressure."

The consideration of these cases shews that a voluntary preference given by a debtor to one or more of his creditors is not void against the bankrupt acts, unless it be given in contemplation of bankruptcy, or in this country unless it be given in contemplation of insolvency.

It is not the doing of the acts which is avoided, but the doing them in contravention of the policy of these special statutes: *Bittlestone v. Cooke*, 6 E. & B. 296; *Smith v. Timms*, 7 Jur. N. S. 1015; *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Johnson v. Fesenmeyer*, 25 Beav. 88, 3 De G. & J. 13.

The assignment of the whole of a debtor's property is not necessarily an act of bankruptcy. It is so or is not so according to the circumstances. It depends upon whether the parties intended to contravene the bankrupt laws or not: *Bell v. Simpson*, 2 H. & N. 410; *Pennell v. Reynolds*, 11 C. B. N. S. 709; *Mercer v. Peterson*, L. R. 3 Ex. 104.

When the 89th section declares that any sale, &c., made within the thirty days, shall be presumed to have been so made in contemplation of insolvency, it means, according to the signification of these words, that the sale, &c., shall be presumed to have been made with the intent to defeat the general distribution of effects which takes place in insolvency: *Morgan v. Brundrett*, 5 B. & Ad. 296; *Bills v. Smith*, 11 Jur. N. S. 156; *Atkinson v. Brindall*, 2 Bing. N. C. 225.

That being so, it is equivalent to saying that the act done being presumed to have been done in contemplation of insolvency, shall be presumed to have been done for the purpose of giving to "the creditor an unjust preference over the other creditors," because it is that preference which has the tendency to defeat the general distribution of the estate.

But an act done in contemplation of insolvency may alone be sufficient to make it an act of insolvency, and so to avoid it under the statutes, although there was no fraudulent preference or other invalid act accompanying it: *Nunes v. Carter*, L. R. 1 P. C. 342.

This section then is, that if any debtor in contemplation of insolvency make any sale, &c., to any creditor, whereby the creditor obtains or will obtain an unjust preference, the sale, &c., shall be void; and if it be made within the thirty days it shall be presumed to have been made in contemplation of insolvency, that is, it shall be presumed to give the unjust preference, or to defeat the equal distribution among creditors.

The next question is, what kind of a presumption is this. Is it a presumption which may be repelled, or is it an inference or conclusion in law which cannot be controverted?

In *Taylor on Ev.*, 4th ed., sec. 62, note, the authorities relied on are set out. It appears from them that a presumption is raised either by the law or by the Judge. That which is raised by the law, or so established as proved, admits nothing to the contrary, and cannot be repelled. The one presumption is called *juris et de jure*, the other *juris*. That presumption which is raised by the Judge is usually called a *præsumptio hominis*, and always admits of proof to the contrary.

In *Austin's Jurisprudence*, vol. i., p. 507, the subject of presumptions is considered, and also in *Best on Presumptions of Law and Fact*, secs. 17, 18, 19.

If the transaction between the insolvent and defendant is to be deemed void because it took place within the thirty days next before the assignment, and if no proof can be

received to the contrary, there must be a new trial, for the case was not so left to the jury. But if it be a presumption merely which may be answered, there was no misdirection, and the case must be disposed of on the merits.

There are several clauses which require to be considered.

The 86th section declares all gratuitous contracts or conveyances, or made without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming an insolvent within three months next preceding the date of the assignment, and all contracts by which creditors are injured made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability, &c., "are presumed to be made with intent to defraud his creditors."

The perusal of this section shews that the presumption here should be the *præsumptio juris et de jure*, for why should a conveyance made by a debtor without consideration, especially if made within the three months, be supported against creditors; or why should a contract by which creditors are injured, made by a debtor unable to meet his engagements, with a person knowing such inability, be permitted to stand? It is manifest that this section should be read as if it concluded that all such contracts "are to be deemed to be made with intent to defraud creditors."

The word *presume*, as is stated in *Austin's Jurisprudence* already referred to, is an absurd and inappropriate term when it is used to express an inference or conclusion in law.

The 87th section provides that a contract or conveyance for consideration by which creditors are injured, made by a debtor unable to meet his engagements with a person ignorant of such inability, and before such inability has become public and notorious, but within thirty days next before, &c., is voidable, and may be set aside on terms as to the protection of the person from actual loss or liability.

There, although the person who took the conveyance gave value for it, and was ignorant of the debtor's inability

to pay his debts, he is, nevertheless, if creditors are injured by it, compelled to give it up if he took it within the thirty days, on being relieved from loss by reason of it. He is reinstated in his former position on account of his fair dealing, but because he dealt with the debtor within the thirty days, and creditors have been injured, he must gain nothing, while he loses nothing.

The 88th section declares that all contracts, conveyances, and acts made and done by a debtor with intent fraudulently to impede or defraud his creditors, and so made, done and intended with the knowledge of the person contracting or acting with the debtor, and which have the effect of impeding creditors "are prohibited and are null and void, notwithstanding such contracts, conveyances, or acts, be in consideration or in contemplation of marriage."

The 89th section has been already given.

The 90th section makes every payment within the thirty days by a debtor unable to meet his engagements to a person knowing such inability, or having probable cause for believing it to exist, void, provided that if any valuable security have been given up in consideration of such payment, the security or the value of it shall be restored to the creditor before the return of the payment can be demanded.

This section, it will be seen, avoids the payment altogether if made by a debtor unable to pay his debts, and the creditor knew it or had reason to believe it, so long as it was made within the thirty days.

The 91st section, in like manner, avoids all debts set off under the like circumstances.

The statute uses different expressions impeaching the validity or efficacy of these different transactions.

The statement in the 86th section that the acts there mentioned "are to be presumed to be made with intent to defraud" should, as before stated, be read "are to be *deemed* to be made," &c., or, to be more explicit, should be read "are void," for that in my opinion is the plain meaning and declaration of the section.

It would be strange if the contracts in that section were

permitted to be maintained in any form, while the innocent contracts in section 87 were to be avoided at the will of the creditors, and while the payment and set off by sections 90 and 91 were wholly avoided, merely because the debtor in these cases was not able to pay his debts, and the creditor had reason to believe it.

Then should the like interpretation be applied to section 89 as to section 86, and should the word *presumed* there be read *deemed*?

The first part of the 89th section declares null and void all sales, deposits, pledges, and transfers made by a debtor in contemplation of insolvency, to a creditor who thereby gets an unjust preference. And in that respect it agrees with the 88th section, which likewise expressly avoids all the transactions therein enumerated.

So far there is no difficulty. It is in the concluding words where the difficulty lies: "And if the same be made within thirty days next," &c., "it shall be presumed to have been so made in contemplation of insolvency."

Does the mere fact of the transaction having taken place within the thirty days defeat it altogether, or does it merely raise a suspicion against it, which the creditor must remove before he can get the benefit of it?

The words must again be attended to. They are, that if the Act be done within the thirty days, it shall be presumed to have been done "in contemplation of insolvency." That is, when the act has been done in contemplation of insolvency, and has been done more than thirty days before insolvency happens, the act is made null and void, on proof that it was done in contemplation of insolvency, and that it gave an unjust preference to the creditor. When the act is done within thirty days, no proof of any kind is required to impeach it. It is presumed to have been done in contemplation of insolvency, and it is impeached by the mere fact of the time when it was done.

I think, however, it is not more than impeached. It is not defeated or avoided. If it were, it would be doing so, although it was founded on consideration, although the

debtor was then able to meet all his engagements, and (if he were not) although the creditor did not know or had no reason to know of the inability, and although also it was not in fact made in contemplation of insolvency, or by way of preference, or to injure, obstruct, or delay creditors. It would be placing a very harsh construction on the language, which is capable of a different, a more appropriate, and more equitable construction.

It is a different rendering than that which has been given to the 86th section, although upon the like words; but the difference between the two sections quite justifies the different construction.

If the word had been *deemed* instead of *presumed*, the fact of the transaction having happened within the thirty days would alone have been evidence, and conclusive evidence, that it had been done in contemplation of insolvency: *Nunes v. Carter*, L. R. 1 P. C. 342.

This case also shews, as do also the whole of the earlier English Bankrupt Statutes, that the most innocent and meritorious transactions were avoided on the mere ground that they were done within a certain prohibitory period before the failure of the debtor.

The policy of the English law in this respect has been altered for many years, and there is now no relation back so as to over reach *bonâ fide* transactions.

In *Churcher v. Cousins*, 28 U. C. R. 547, I seem to have thought that enactment a presumption only, and not a conclusive inference of law.

The tendency of modern decisions, as well as of legislation, has been not to consider presumptions as irrebuttable, but to restrict rather than to extend their number: *Best on Presumptions*, sec. 18.

As we do not regard this to be a presumption *juris et de jure*, or a matter which is incontrovertible, we are of opinion there was no misdirection, but a proper direction given upon that branch of the statute in point of law.

So far as the merits are concerned, it is always difficult in a case of the kind to say with certainty whether the

conclusion arrived at by the jury is contrary to the evidence or not.

The first issue is, whether the insolvent gave the goods in contemplation of insolvency by way of payment to the defendant, whereby he obtained an unjust advantage.

To prove it, the plaintiff had to shew that the insolvent gave the goods voluntarily, and to give the defendant a preference: *Groom v. Watts*, 4 Ex. 727; *Brown v. Kemp-ton*, 19 L. J. N. S. C. P. 169.

That the insolvent acted voluntarily, within the meaning attached to that word, I am not prepared to say. The defendant wrote to him to call and arrange matters.

In *Groom v. Watts*, 4 Ex. 727, the defendant's wife applied to the debtor for money to take up the note the defendant's wife had made as a surety for the debtor jointly with him. The jury found against the defendant on a charge to them to say whether the debtor, contemplating bankruptcy, voluntarily gave the money to defendant, intending to favor him beyond the other creditors, but still the evidence was left to the jury.

It is impossible to declare the minimum of language or of conduct on the part of a creditor which will be strong enough to remove the volition of the debtor.

A request by the creditor is sufficient, and it is not necessary there should have been pressure by the creditor, or an apprehension by the debtor that the debtor would be in a worse condition by his not making the payment, or otherwise complying with the creditor's request. It is enough if the moving cause were the solicitation of the applicant, and not the desire of the debtor himself to defeat the general distribution of his property: *Mogg v. Baker*, 4 M. & W. 348; *Van Casteel v. Booker*, 2 Ex. 691.

I should have thought the request of the defendant was not of that nature which took away from the debtor his perfect freedom of mind and of action. I should have thought that the act of the insolvent was still a really voluntary act; but, as a matter of law, it cannot be said it was so.

There was no actual fraud. The case of *Bell v. Simpson*, 2 H. & N. 410, is very much like the present transaction, and from the facts there the Court would not infer fraud, or any desire to contravene the bankrupt law.

I cannot say this first issue was wrongly found on the facts. They were, that the defendant had security for that part of his debt which was paid off, the reduction of which by this dealing the creditors will get the benefit of, and the rest of the price of the pork was paid for by the defendant to other creditors. It was denied that the creditors would get any advantage by the reduction made on the defendant's security, because it was said the security was not now worth more than the balance still due upon it, but that was a matter for the jury.

Then the third issue was, whether the defendant knew of the insolvent's inability to pay his debts, or had probable cause for believing so at the time of his purchase from the insolvent. There was evidence leading to the conclusion that the defendant had such knowledge, or that he had very good probable cause for believing the inability, but there was evidence opposed to it also.

The other issues were properly found, if the first and third were decided against the plaintiff.

Upon the whole, the law not being against the defendant, we see no sufficient reason for disturbing the verdict upon the facts.

The rule will therefore be discharged.

MORRISON, J., concurred.

RICHARDS, C. J., was not present during the argument, and therefore took no part in the judgment.

Rule discharged.

ARCHIBALD V. HALDAN.

Insolvency—Mortgage—Pressure.

The insolvent, an Innkeeper, on the 12th of August, 1869, gave the plaintiff a mortgage *upon the whole of his property*, payable in six months, for an over due debt. The attachment in insolvency issued on the 6th December, following, and the assignee seized and sold the goods.

The evidence shewed that the mortgagor knew or had strong reasons to believe himself to be insolvent when he gave mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors.

Held, that under these circumstances it was not void under the Insolvent Act as against the assignee.

THIS was an action for seizing goods, brought by the plaintiff, who claimed the goods as mortgagee, against the defendant, who was assignee in insolvency of William Campbell, the mortgagor; and the question was whether such mortgage was valid as against the defendant. The case had already been before the Court upon demurrer, 30 U. C. R. 30.

The case was tried before *Wilson J.*, at the last Goderich Assizes. It appeared that Campbell, who was an Innkeeper at Lucknow, being indebted to the plaintiff, a merchant at Goderich, executed on the 12th of August, 1869, a mortgage on his chattel property, to secure the payment of the plaintiff's debt; that an attachment in insolvency issued against Campbell on the 6th December, 1869; and that the defendant took possession of the goods mentioned in the mortgage and sold them, being indemnified by some of the creditors.

The mortgage was for \$200, being money due to the plaintiff for goods purchased some months before, and covered all Campbell's property, consisting of the furniture and household stuff used by him in the hotel, of which he was a lessee. It contained a proviso making it void on payment of the \$200, with interest, in six months, and an agreement that in case of default the mortgagee might take possession and sell the goods, or hold and enjoy them, but no proviso for possession by the mortgagor

until default. He remained in possession, however, until the sale of the goods by defendant, which took place after the mortgage had fallen due, and realized about \$350. The insolvent's liabilities exceeded \$1000. It was proved that the defendant had been pressing him for payment, and had threatened by letter to sue him, and required him to give this security.

The case was tried without a jury, and a verdict rendered for the plaintiff for \$214, the learned Judge being of opinion, on the evidence, that the defendant Campbell gave the mortgage under pressure, not with intent to defeat or delay creditors, but to stave off a present urgency; and that he then knew or had strong reason to believe himself to be insolvent, but that there was no evidence that the plaintiff knew it. Leave was reserved to move to enter a verdict for defendant or a nonsuit, and to re-open the whole case upon the evidence.

During last term *Robinson*, Q. C., obtained a rule nisi to enter a verdict for defendant, pursuant to leave reserved, on the ground that the mortgage was void as against the defendant, and that the plaintiff was not entitled to recover against the defendant, under the evidence.

Moss shewed cause. The mortgage being given under pressure, not voluntarily, was valid. It could not be a fraudulent preference within the meaning of the Act unless voluntary, and even a demand or request, without suit, is sufficient; to constitute a fraudulent preference the transaction must be purely voluntary: *Shrubsole v. Sussams*, 16 C. B. N. S. 459; *McWhirter v. Thorne*, 19 C. P. 310; *Churcher v. Cousins*, 28 U. C. R. 540; *In Re Wallis*, 29 U. C. R. 313; *Newton v. Ontario Bank*, 15 Grant 283. It is true that the mortgage covered the whole of the debtor's property, but that does not necessarily avoid it, and our Insolvent Act, by which we must be governed, contains no provision by which the transaction can be attacked upon that ground. The decisions in England, therefore, are not strictly applicable here: *In re Colemere*, L. R. 1 Ch. App.

128; *Mercer v. Peterson*, L. R. 3 Ex. 304, S. C. in Ex. Ch. 3 Ex. 104.

Robinson, Q. C., contra. It must be admitted that the authorities cited, to which may be added *Ex parte Tempest In re Craven et al.*, L. R. 10 Eq. 648, 6 Ch. App. 701, seem to establish conclusively that the evidence of pressure here was sufficient, and that being so it could not be considered a fraudulent preference. But whether executed under pressure or not, the cases are equally conclusive to shew that the mortgage in this case is void, as being a conveyance of the debtor's whole property, and one which if acted upon would necessarily have stopped his trade and produced insolvency as to the other creditors. In *Arch. Bank*, ed. of 1867, vol. i. p. 132 it is said: "There is no doubt that pressure by the creditor will prevent an assignment from being held a fraudulent preference of the creditor and void as such, but an assignment may nevertheless be void as an act of bankruptcy: for instance, an assignment of *all a* trader's goods, or all with a colorable exception, will be void under the conditions before mentioned, whether given under pressure or not." Many cases are there cited, in most of which, it is said, the assignment was executed under pressure. The test is whether the dealing is such as, if acted upon, must stop the trade and produce insolvency as to the other creditors, and so necessarily defeat and delay creditors: *Re Lilburne*, 12 L. T. Rep. N. S. 210. See also *Lindon v. Sharpe*, 6 M. & G. 895; *Smith v. Cannan*, 2 E. & B. 35; *Johnson v. Fesenmeyer*, 25 Beav. 89; *Allen v. Bennett*, L. R. 5 Ch. App. 577; *Jones v. Harber*, L. R. 6 Q. B. 77; 1 Sm. L. C. 20-21, 6th ed.; *Robson Bank*. L. 108. There is no difference, and no reason for any difference, in this respect between the law in England and in this country: *McWhirter v. Royal Canadian Bank*, 17 Grant 480. The facts here are very strong. The mortgage was wholly for pre-existing debt. It included all the goods of the debtor, who was an innkeeper, without even a colorable exception, and he had no real estate; if enforced it must at once have

stopped his business, and it might have been put in force immediately, for it contained no proviso allowing him to remain in possession until default: *McAulay v. Allen*, 20 C. P. 417.

MORRISON, J., delivered the judgment of the Court.

I have read over the evidence given on the trial, and I concur in the views and verdict of the learned Judge.

On the argument Mr. Robinson said he could not contend that the mortgage was not given under pressure, but he contended that the debtor, Campbell, having by the mortgage in question assigned over all his property rendered it void under these circumstances against the assignee.

Now it appears that the mortgage was made some three months before the attachment in insolvency issued against the debtor; that the plaintiff was not aware at the time that Campbell was insolvent; and the learned Judge found that it was not made with the intent to defeat or delay creditors.

Under these circumstances we think that this rule should be discharged, as in our opinion the mortgage was not void as against the assignee, notwithstanding that it was a mortgage covering all the goods of the debtor at the time it was made.

It is unnecessary to refer to the various provisions of the Insolvent Act, as during this term they were all fully considered in the judgment of my brother Wilson, in the case of *Campbell v. Barrie* (a).

Rule absolute.

TULLY ET AL. V. CHAMBERLAIN.

Action on award—Excess of authority—Matters considered not within the submission.

By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant on or before the 20th March then next, for which the defendants covenanted to pay so much per log. It was provided that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks.

By a submission under seal, reciting this agreement and that differences existed in respect thereof and of the advances made thereon by defendant to plaintiffs, all such differences were referred to arbitration. The arbitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, \$866.

To an action on this award, defendants pleaded no award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that, owing to the snow, the plaintiffs could not proceed with the work, and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the cost of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference.

Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiff for work done under the verbal agreement, which was not within the submission: that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action.

ACTION on an award.

Pleas: *Non assumpsit*, and no award.

At the trial, at Peterborough, before Galt, J., the plaintiffs put in the agreement of reference under the hands and seals of the parties, dated 8th July, 1870, which recited an agreement made between the parties, by which the plaintiffs agreed to draw, carry, and convey certain saw logs particularly mentioned in the agreement, at and for prices also therein mentioned, to be paid to them by the defendant; and that the plaintiffs entered upon said work and drew certain of the logs, and received advances from time to time from the defendant; and that differences had arisen and were existing between the parties "in respect of the said agreement, and in respect of the said amount of said advances, as to their being in excess or other-

wise of what, if any thing, was payable to the said parties of the second part, (the plaintiffs,) and that it is desirable to refer such differences to arbitration as hereinafter mentioned." And it was thereby agreed to refer all matters in difference between the parties "in respect of the said recited agreement and the advances thereon made," and which agreement was to be produced to the arbitrators thereafter named. The reference contained the usual provisions.

The agreement referred to was also produced, dated 14th February, 1870, by which the plaintiffs covenanted to draw, carry, and transport and convey, during the then winter, all the logs then lying and being on certain timber limits, and deliver the same upon the ice on certain lakes, &c., on or before the 20th day of March then next ensuing; and the defendants covenanted to pay therefor at the rate of thirty cents per standard log, one half thereof, if required, as the work progressed, and the remainder on the completion of the contract. There were several provisions which it is unnecessary to refer to, and at the end of the contract was this proviso: that should the sleighing in the woods not hold sufficiently good for a period of four weeks forward after the date thereof, the plaintiffs should only be bound to put in such portion of the logs as would be in the same proportion to the whole of the work to be done as the time during which such sleighing should continue would bear to the four weeks from and after the date of the contract.

The award was also put in, and by it, after reciting the agreement of reference as above, the arbitrators chosen awarded that there was due and owing from the said defendant to the said plaintiffs, in respect of the said recited agreement, the sum of \$866.91, and ordered and directed the same to be paid by the defendant to the plaintiffs in one month from the day of the date thereof (viz., 20th August, 1870), &c.

The plaintiffs' case being closed, for the defence William Snider, one of the arbitrators, was called, and on being

asked whether the arbitrators made the agreement of the 14th February, 1870, the basis of their award, he said they made a portion of it; and he stated that the evidence satisfied the arbitrators that the snow was so deep in the woods in last February and March that the plaintiffs could not proceed with their contract, and that the plaintiffs so notified the defendant: that it was proved before the arbitrators that defendant told them to go on, and that they, the plaintiffs, should not lose any thing; and that it was on this undertaking of the defendant that the arbitrators proceeded in making their award, and they did so, as they considered they had a right so to do under the last clause of the agreement.

It appeared also that the defendant and his counsel were present at the sittings of the arbitrators, and no objection was made to the reception of the evidence of the verbal understanding, and the award was made for the cost of drawing the logs mentioned in the agreement.

In answer to a question put by the Court, the arbitrator said no objection was made by defendant or his counsel to the arbitrators proceeding with the enquiry on the ground that the matters in dispute were not covered by the reference.

Upon this evidence, the learned Judge directed the jury that the plaintiffs were entitled to recover, ruling that it was a valid award. The counsel for defendant objected to this ruling, and a verdict was rendered for \$890.52.

In Michaelmas Term last, *C. S. Patterson* obtained a rule *nisi* to set aside the verdict, on the ground of misdirection in the learned Judge, in ruling that the award was good, it being proved that the award was not made of and concerning the matters submitted, and also that the verdict was, on the same ground, contrary to law and evidence.

During this term, *Robinson, Q. C.*, shewed cause. This was a dispute arising out of the agreement referred, and so fairly within the reference. The arbitrators were judges as to the meaning of the agreement, and considered that under

the last clause of it the amount due upon the arrangement made between the parties might be enquired into. The defendant himself acquiesced in this view, for he was present at the enquiry, and allowed this arrangement to be proved and considered by the arbitrators, without objection of any kind either to the admission of the evidence or the jurisdiction of the arbitrators; and he is therefore now precluded. Arbitrators are not bound as the judges are in a court of law. He cited *Glen v. Grand Trunk R. W.*, 2 P. R. 377; *Thorburn v. Barnes*, L. R. 2 C. P. 384; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 3 Ex. 306; S. C. in Ex. Ch. 5 Ex. 221.

C. S. Patterson, contra. The arbitrators here have exceeded their authority, which is conferred only by the submission, and which is plainly limited to the written agreement and the advances made upon it. They have taken into consideration and awarded upon another agreement altogether, a verbal one, which was not referred; and the defendant has done nothing to confer upon them jurisdiction or authorize the award. The cases cited on the other side shew that such excess of authority forms a defence to this action.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that the award in question cannot be supported, and that the rule must be absolute for a new trial; and we rest our opinion upon the ground that it appears from the evidence given on the trial by one of the arbitrators, that the arbitrators exceeded their jurisdiction in awarding compensation to the plaintiffs for services or work done in pursuance of an undertaking on the part of the defendant not within the submission; the submission being only of matters in difference between the parties in respect of the agreement under their seals of the 14th February, 1870, and to be produced to them, and the advances thereon made by the defendant to the plaintiffs, and it being clear from his testimony that the arbitrators included and considered the other verbal agreement or

undertaking of the defendant made with the plaintiffs, after they had notified the defendant they would not further proceed with the work under the agreement of the 14th February.

The extent of the arbitrators' jurisdiction is to be taken according to the plain words of the submission; and in this case it is specifically stated in the submission to be the matters in difference under the agreement of the 14th February, and the advances made thereon. Now any subsequent or other agreement that the plaintiffs and defendant made cannot, in our opinion, be within that submission, although such other new or substituted agreement may have been the result of inability or unwillingness of the plaintiffs to carry out to completion their contract of the 14th February. The arbitrators appear, from Mr. Snider's testimony, to have considered that they had a right, under the last clause of the agreement, to give the plaintiffs compensation for work done under the alleged subsequent undertaking of the defendant. In this respect we think the arbitrators, through mistake, included in their award a matter of liability of the defendant independent of the contract of the 14th February, and not within the submission.

As said in *Jones v. Corry*, 5 Bing. N. C. 191: "This is in effect a mistake made by the arbitrator as to the extent of his jurisdiction, * * and the Court is authorized to hear what the arbitrator has said as to the principles upon which he considered his jurisdiction to be founded."

The question of authority of an arbitrator is most ably and learnedly discussed in a recent case in the Exchequer Chamber, *The Duke of Buccleuch v. The Metropolitan Board of Works*, L. R. 5 Ex. 221, and we select the following from the judgment of Blackburn, J., at p. 229, as bearing on this case: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute, and no other. And from this it follows, that if that limited authority has not been pursued and the

arbitrator has awarded something beyond the authority, the award is *pro tanto* void; and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part. And I think, both on authority and principle, this is a matter which may be pleaded as a defence to an action. * * * Accordingly, it still remains open to a party to plead to an award any matter which shews that the arbitrator has not pursued his authority; either, in cases where he is required to make a final determination on all matters, by not determining some matter brought before him which he ought to determine, or by including in his award something which he had no authority to entertain, and which could not be severed from the rest and rejected. Nor is it, I think, any objection to such a plea that the award is good on the face of it, so as to purport to be a decision on all matters which ought to be decided, and only on matters within the authority. * * The award is the judgment of an inferior tribunal having a limited authority, and the law is, I think, accurately stated in the very learned opinion delivered by Willes, J., in *Mayor, &c. of London v. Cox*, L. H. 2 H. L. at p. 262." And again, at p. 232, referring to mistakes made by arbitrators: "If the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. Were this otherwise, no one who submits to a reference of one thing could be safe from having an award put upon him as to any thing else. Accordingly, in *Jones v. Corry*, 5 Bing. N. C. 187, where the Court of Common Pleas were satisfied that the arbitrator had misconstrued the order of reference, and so mistaken the limits of his authority, the award was set aside."

In the case before us the arbitrators mistook their

powers in awarding that the defendant should pay for work under the subsequent undertaking referred to. Certainly the last clause or condition in the contract referred to, and upon which the arbitrators founded their jurisdiction, did not authorize them to enquire into the matter of the defendant's liability under the subsequent verbal agreement. That proviso was inserted in favor and ease of the plaintiffs, and not with any design of creating any liability on the part of the defendant. If the arbitrators had separately awarded what they thought the plaintiffs entitled to under the contract of the 14th February and the subsequent undertaking, we might have been able to have allowed the verdict to stand for the amount applicable to the matters in difference within the submission.

On the whole, we think the rule should be absolute for a new trial without costs.

Rule absolute.

IN RE SMITH AND SHENSTON, REGISTRAR OF THE COUNTY OF BRANT.

Certificate of discharge of mortgage—Registration—31 Vic. ch. 20, O—Mandamus.

Under 31 Vic. ch. 20, O., a registrar cannot be required to register a certificate of discharge of mortgage applying to more than one instrument. Each mortgage to be discharged should have a separate certificate.

Quære, as to the effect and validity of a certificate embracing several mortgages, or of its registry.

In this case the certificate related to two mortgages, stating that they were respectively registered in the registry office for the county of Brant, on the day and hours named, in liber A of the general register for the county, as numbers 53 and 66, respectively. The registrar registered it in the general register book, but refused to record it in the books for the town and township of Brantford, though the mortgages included land there, on the ground that it only mentioned the number of each mortgage as registered in the general registry book.

Held, that this reason was insufficient.

A rule *nisi* having issued for a mandamus to compel him to register, the objection to including both mortgages in one certificate was first taken on the argument; and the Court, under these circumstances, discharged the rule without costs.

In Hilary Term last *A. J. Wilkes* obtained a rule calling on Thomas S. Shenston, the registrar of the county of Brant,

to shew cause why a writ of mandamus should not issue, commanding him to register a discharge of certain mortgages from Jesse Sage to one Arthur W. Smith, bearing date the 21st of August, 1869, (which has been registered in the general register book, in the registry office for the county of Brant, as number 85) in the register book for the town of Brantford, and also in the register book for the township of Brantford, in which the mortgages to which said discharge refers are registered, and to make the usual entries with respect to the said discharge in all necessary books; and why the said Thomas S. Shenston should not pay the costs of this application.

The certificate of discharge stated that the mortgages were respectively registered in the registry office for the county of Brant, on the 29th of July, 1868, at thirty minutes past two o'clock, p.m., and on the 16th of November, 1868, at fifty minutes past ten, a.m., in liber A of the general register for the county of Brant, as numbers 53 and 66, respectively.

The memorandum of registration endorsed on the copy of certificate furnished by the registrar was number 85, and by it was certified that the discharge was duly entered and registered in the registry office for the county of Brant in Book A for the general register at eleven o'clock and twenty five minutes of the 23rd of August, 1869.

The affidavit filed shewed that the lands in the mortgages were, among other lands, lot number three on the north side of Mill Street, in the town of Brantford, also certain lands in the township of Brantford, and generally all other real estate of the mortgagor derived by him under the will of his father: that the discharge had not been entered in the abstract of titles book in the said registry office for the town of Brantford as against lot number three on the north side of Mill Street, although registered in the registry office in the general register book: that the registrar was requested to register the discharge in the register book for the town of Brantford, and to enter the discharge in the abstract book, and also in all abstract books in his

office in which the titles to any land covered by the mortgages appeared : that the registrar refused to register the discharge in the register books for the town of Brantford, and to enter the discharge in the said abstract books as against the said lot, although admitting that the mortgages mentioned in the discharge, according to the purport of the discharge, were paid and satisfied, alleging, as the only reason therefor, that the discharge only mentioned the number of each of the mortgages as registered in the general register book in the registry office, and, also alleging the same reason, refused to register the discharge in any other of the register books in his office in which the mortgages were registered, except the said general register book : that the mortgagor was about closing up a sale of the said lot number three, and the purchaser refused to pay the balance of his purchase money while the said mortgages appeared against the said lot, and until the title to the said lot appeared in the said register books as clear and unincumbered.

In this term *M. C. Cameron*, Q. C., shewed cause. The certificate of discharge contains more than one mortgage as paid off, and it refers only to the numbers 53 and 66, which are the numbers of registration in the general register book. The mortgage numbered 53 according to the registration in the general register book, was also registered in the register for the township of Brantford as number 4088 in liber H, and also in the register for the town of Brantford as number 4555 in liber I. The mortgage numbered 66 according to the registration in the general register book, was also registered in the register for the township of Brantford as number 4188 in liber H, and also in the register for the town of Brantford as number 4657 in liber I. The registrar has not registered the discharge in the registers for the township or town, because the certificate does not refer to the township or town registration, but to the general registrations only. The certificate of discharge should not have referred to the two mortgages, for by doing so the registrar receives only the

fee as for registering or entering the discharge of one. As part of the land contained in a mortgage may be discharged without acquitting the rest, it may be that this certificate, by referring to the general registrations only, intended to confine the discharges to the lands affected by that general registration. Mr. Shenston's affidavit explains these facts, and states further that the discharge is recorded at full length in the general register, and in the margin of numbers 53 and 66 above mentioned. And Mr. Kerr, who drew the discharge, states in his affidavit that while he considered the discharge as drawn would operate as a discharge of all the lands in the mortgage mentioned, he was particularly concerned to have the mortgage discharged from the general register: that he was acting for himself and one Lethbridge, and both of them had purchased lands of the mortgagor not especially but only in general terms referred to in the mortgage, and it was, so far as he knows, the immediate object of the discharge to clear the title to the lands so purchased by Lethbridge and himself of the incumbrance created by the mortgage; and that he paid only fifty cents to the registrar for registering the discharge.

Wilkes supported the rule. The registrar should not now take any exception which he did not take when he refused to make the registration required by him. He did not then refuse to register the discharge fully because it referred to two mortgages instead of one, if that be an objection. By sec. 54 of the Ontario Act 31 Vic., ch. 20, the Registrar is required to copy into the registry book pertaining to each city, town, incorporated village, township, or place wherein the lands are situate in the same county, any instrument which includes different lots, although only one duplicate of the instrument is furnished to him. So that the whole instrument is copied on each registration, although there are many lots of land mentioned in the instrument and only one of them is situate in the municipality for which the entry is made; and that is done upon

the single copy or duplicate which is furnished. In this case each of the two mortgages was, on the same duplicate of each that was furnished, registered three times ; first of all in the general registry book, secondly, in the Brant township registry book, and thirdly, in the town of Brantford registry book. A full discharge of these mortgages should have been entered or registered in the like manner against all the former registrations that had been made of the mortgages. The discharge need not have mentioned the number of registration of the instrument to be discharged, for although the form J. in the appendix provides for it, sec. 60 requires only a certificate "to the like effect." The entry of the discharge in the general registry book in fact discharges all the lands from the mortgage, and the specific lands being discharged there should be the special entry of it made against such specific lands. The question of fees is not the question here involved. The applicant would have paid and would now pay any fee the registrar demanded. It was necessary to have this particular discharge registered, for the person who gave it is not now here, and cannot conveniently be got, otherwise a different certificate, although not strictly required, would be got at once.

WILSON, J., delivered the judgment of the Court.

This application must be disposed of according to the provisions of the statute. It is with respect to them and their construction that the parties differ.

By sec. 22 of the Act the treasurer of the county or city is required to provide a fit and proper registry book for each township, reputed township, city, town, and incorporated village, the limits whereof are defined by law, and all indices and other books required for the business of the office ; and the registrar shall keep and use "a separate registry book for and of each township, reputed township, city, town, and incorporated village, the limits whereof are defined by law, within the county." And he shall also keep and use "a general registry book for the whole county, in which shall be recorded all wills and instruments

in which there is a general devise, conveyance, or power affecting lands without local description," &c.

The manner of registration is provided for by section 54, in accordance with the books which the registrar is required to keep.

It is now contended before us that the certificate is irregular because it relates to two different mortgages which have been separately registered.

The old law, Consol. Stat. U. C. ch. 89, when registration was by memorial, contemplated there being a memorial for every separate instrument: sec. 19 and sub-secs., secs. 20, 21, 22, 23, 24, 26, 30, 35.

By sec. 33 it was expressly provided that only one memorial should be required for a county when there were lands situated in different localities of the county, and which were mentioned in any deed, will or instrument. But there was no provision for having only one memorial for different instruments, excepting in the case of a sale of lands by the sheriff, and then, by sec. 34, the sheriff's certificate might comprise a schedule of any number of such deeds, which should be in the place of a memorial. That section I understand to have been restricted to deeds to the same purchaser: Consol. Stat. U. C. ch. 55, secs. 151, 152; 6 Geo. IV., ch. 7, sec. 19.

There was provision also in the original Registry Act, 35 George III., ch. 5, sec. 12, for one memorial being sufficient for more writings than one concerning the same land, in case it were a full memorial of one of such instruments, and described the others by their dates. That enactment applied necessarily to writings between the same parties, or substantially the same parties, for it applied only to the case of there being one or more writings "for making and perfecting any conveyance or security." So that it was probably intended to provide for the case of deeds of lease and release, which formally, though separate and different instruments, formed but the one conveyance. It might also have applied to a deed and a defeazance. It does not seem to have been continued by any later act.

The provision as to the certificate by the sheriff, which was made applicable to several deeds by the provisions before referred to, for the purpose of registration, and the earlier provision in the original Act as to one memorial being applicable to different writings, not being continued in the present Registration Act, is strong evidence that it was not deemed advisable to maintain them longer.

And the special enactments which provided for just these cases are strong indications, falling in as they do with the general scheme and language of the Act, that it was necessary to have a separate memorial for every separate instrument, unless it were provided to the contrary.

If two mortgages between the same parties and concerning the same lands can be discharged by the one certificate, then fifty such instruments may be embodied in the one certificate. And it may be urged then that mortgages between different persons, or relating to different lands, may be contained in the one certificate, each of which mortgages might contain many separate parcels of land in different municipalities, and so create great difficulty and confusion, apart altogether from the question of fees of the registrar, although that officer might reasonably claim to be entitled to more than fifty cents for twice as many registrations, notwithstanding that sum is the limit of his remuneration "for registering each certificate."

We are of opinion that the registrar cannot be required to register a certificate of discharge of mortgage, if that certificate applies to any other than the one instrument to be discharged. Each mortgage to be discharged should have a separate certificate.

We do not say that the certificate which does embrace more than the one mortgage to be discharged is void.

It is undoubtedly very inconvenient that such a mode of business should be pursued, and it might be carried to such a degree as to be embarrassing and prejudicial to the public as well as to the officer.

While we pronounce no opinion on the effect or validity of the present certificate, or on the effect or validity of its

acceptance and registry by the registrar, so far as he has already acted on it, we cannot require him to do still more upon it than he has done, while we think he could not have been required to register it at all, and think he should not have done it in its present form.

The registry law is very beneficial in its purpose and provisions, and very simple in its enactments and working. We should endeavor then to maintain a system so well devised and of so much public concern as free as possible from confusion, and to enforce its being conducted in a business-like manner to facilitate enquiry, and by which every act done can be readily traced and authenticated.

That purpose will not be answered by crowding into a single certificate the discharge of many mortgages, even between the same parties and concerning the same lands, and still less when both the parties and the lands are different.

We must decline therefore to order the registrar to act upon such a certificate.

We cannot refuse to give effect to this objection, although not made at the time he was requested to register it, but taken only on the argument of the rule, for the Court is still at liberty to dispose of the application as it may be advised, however the parties may have acted, and we think the objection which has been brought to our notice is one of such sufficient consequence to justify us in refusing to aid the applicant in his motion.

If the certificate had not been objectionable in the manner just stated, I should have thought that when it declared that the mortgagee had satisfied *all money* due on the mortgages, and that *such mortgages were therefore discharged*, and when it described the parties to them and their respective dates, and the registration of each of them, and one of the numbers of one registration on each of them, that it had sufficiently identified them, and that the certificate should have been registered in full at all the places in the register books in which the mortgages had been registered, although the numbers of some of the

registrations were not referred to in the certificate. I think that the omission of the number of the registration of the mortgage is not an essential part of the certificate to justify its rejection by the registrar.

The form, it is true, provides for it being given ; but section 60, to which the form relates, says the discharge is to be "in the form J in the appendix hereto, *or to the like effect.*"

A mortgage therefore discharged in full should be registered as so discharged as to all the lands contained in it, and against which the mortgage has been registered, upon any certificate to the like effect as the form given in the appendix. And a certificate which merely omits the number of the registration of the mortgage, or one or more of the numbers of its registration, is still a certificate *to the like effect* as the form given by the statute.

We decide the question against the registrar upon the ground of refusal which he gave for not fully registering the certificate, but we refuse the rule on the exception which he raised at the argument ; and as he did not make the objection until the argument, we think he is not entitled to the costs of opposing the rule.

We therefore discharge the rule without costs.

Rule discharged.

MCLEAN AND THE CORPORATION OF THE TOWN OF
CORNWALL.

By-law—Right to remunerate the mayor—Illegal appropriation—Municipal Act of 1866, secs. 123, 176; 177.

The corporation of a town, at their last meeting in the year, passed a resolution to present a complimentary address to the mayor, who had held the position for several years, and was about to retire from it, and to grant to him the sum of \$1600 as a small token of their appreciation of his long and faithful services, and authorizing the chairman to sign an order upon the treasurer for that sum. On the same day they passed a by-law for the payment of accounts passed for the year, giving a list of them, which the treasurer was directed to pay, and including this sum to be paid to the mayor, "as per order of council." It appeared that the whole taxes of the town for the year amounted only to \$3324.

Held, that the by-law and resolution, so far as regarded the said payment, were beyond the power of the corporation, and must be quashed.

During last Hilary Term *C. Robinson, Q. C.*, obtained a rule calling on the corporation of the town of Cornwall to shew cause why a by-law and resolution of the 16th of January, 1871, or so much of them respectively as directs or authorizes the grant therein to William C. Allen, Esq., the mayor of the said town, of \$1600, should not be quashed with costs, on the ground that the said grant being for remuneration to the said Allen as mayor and councillor, is unauthorized and beyond the power and jurisdiction of the said corporation, and an illegal appropriation of the funds thereof: that the grant, as made and authorized by the by-law and resolution, is not within the powers belonging to the said corporation for the remuneration of the officers of the municipality, and that it is not shewn in either that the grant is for services for which the corporation is authorized to grant remuneration in the manner in the by-law and resolution provided for; and the by-law and resolution provide for the payment of illegal and improper charges to the said Allen, and for services extending over several years, and for the payment of a lump sum therefor; and on grounds disclosed in affidavits and papers filed.

The application was based on an affidavit of Alexander McLean, of the town of Cornwall, an assessed householder of the said town, attached to which were copies of the minutes, by-law, and resolution in question, as follows :—

“ CORNWALL, 16th January, 1871.

“ 10 o'clock, A.M. Council met pursuant to adjournment. Present: the Mayor, Reeve, Deputy-Reeve, and seven Councillors, (naming them).

“ Moved by the Reeve, and seconded by the Deputy-Reeve, that the by-law for the payment of all accounts for the past year be now read a first, second, and third time, passed, and signed by the Mayor, notwithstanding any rule or ordinance to the contrary.—Carried.

“ The by-law was accordingly read a first, second, and third time, passed, and signed by the Mayor.

“ Moved by Councillor Mattice, seconded by the Deputy-Reeve, that the Mayor do now leave the chair, and that Councillor Hodge do take the same.—Carried

“ The Mayor accordingly left the chair, and Councillor Hodge took the same, whereupon it was moved by Councillor Mattice, seconded by the Deputy-Reeve, that the following address be presented to William Cox Allen, Esquire, our Mayor for the last eight years :—

“ That the members of this council, at this their last meeting, do express their regret that William Cox Allen, Esq., M.D., has considered it fitting that he should withdraw from the office of chief magistrate of the town of Cornwall: that the council cannot allow such retirement to take place without putting on record an expression of the high esteem in which now, as in the past, he is held by this council, and of their testimony to the invaluable services rendered by him as councillor and mayor of the town, services which have always been of a prudent, zealous, and impartial character, meriting the highest approval and most sincere thanks of every member of this board; and that as a small token of our appreciation of his long and faithful services, this council do grant him the sum of

\$1600, and that this council do authorize the chairman to sign an order upon the treasurer for the said amount. And be it further resolved, that a copy of this resolution, duly engrossed, be forwarded to William Cox Allen, Esq., M.D., signed by the chairman and clerk of this council, with the official seal of this corporation attached thereto.—Carried unanimously.

“The Mayor was then recalled, and, on motion, it was resolved, that Councillor Hodge do leave the chair, and that the Mayor do take the same, when one of the councillors presented the Mayor with a copy of the above resolution, and the council then dissolved.”

A copy of the address to Dr. Allen, embodying what is set out out above, was also attached to the relator's affidavit, and also a certified copy of the by-law in question.

It was entitled : “By-law for the payment of accounts passed by the council of the corporation of the town of Cornwall for the year 1870, and to the close of the session,” and commenced as follows :—“The council of the corporation of the town of Cornwall enacts that the following accounts, payable by the treasurer, be allowed to the several parties whose names are hereunto annexed, and that the treasurer be authorized to pay the same, and charge them in his annual account.” Then followed a schedule of a large number of items,—the names, services, and amounts,—the last item being, “William Cox Allen, as per order of council, \$1600,” and at the end, “Passed in open council this 16th day of January, 1871.

(Signed) “WILLIAM COX ALLEN.” (L.S.)

The affidavit of the relator further stated that he was dissatisfied with the payment of the sum proposed to the late Mayor Allen : that the assessed value of the real and personal property and taxable income in the said town for the year 1870, amounted to \$332,488.50, as appeared by the assessment roll, and that amount was the basis on which the taxes were levied, the sum being fixed for that year at the rate of one per cent. of such assessed value, and

that the amount directed by the council of the said town to be levied and collected from the ratepayers for 1870, was about the sum of \$3324.88; and that the population of the said town was about two thousand souls.

During this term *Bethune* shewed cause, and *Robinson*, Q.C., supported the rule.

The arguments are sufficiently stated in the judgment.

The following authorities were referred to: *Daniels v. The Municipal Council of Burford*, 10 U. C. R. 478; *Regina v. The Gore District Council*, 5 U. C. R. 357; *Cæsar and the Municipality of Cartwright*, 12 U. C. R. 341; *Wright and The Municipal Council of the Township of Cornwall*, 9 U. C. R. 442; *Municipality of East Nissouri v. Horseman*, 16 U. C. R. 576; *Patterson and The Corporation of the County of Grey*, 18 U. C. R. 189; *Blaikie and The Corporation of Hamilton*, 25 U. C. R. 469; 29-30 Vic. ch. 51, secs. 123, 176, 177, 271.

MORRISON, J., delivered the judgment of the Court.

The question raised on this rule is whether the members of this town council had authority to vote this grant of \$1600 to be paid to Dr. Allen.

Upon an examination of the minutes of the council before us it is apparent that this by-law, which sanctioned the payment of the amount to Dr. Allen, was passed in anticipation of the members of the council immediately thereafter passing the resolution in question ordering the payment of the \$1600, and so I take it that the by-law itself, without the subsequent order of the council, could not have authorized the treasurer to have paid the amount. The by-law is entitled a by-law for the payment of accounts passed by the council for the year 1870, and to the close of the session, and it enacts that the (therein) following accounts, payable by the treasurer, be allowed to the several parties whose names are thereunto annexed, and that the treasurer be authorized to pay the same, and charge them in his annual account. Then follows the

names, the subject of the account or service, and the amount—the last item being, “William Cox Allen, as per order of council, \$1600;” and which amount is thus charged to the expenses of the year 1870, and without stating on what account or for what service Dr. Allen is entitled to receive the amount, except, as it is admitted, it refers to the order of council now in question; and when we turn to the resolution and order to ascertain the grounds upon which the \$1600 was granted and ordered to be paid to Dr. Allen, we find that it was granted to him, as stated in the resolution, as a small token of the appreciation of the members of the council or board for his long and faithful services as councillor and mayor of the town.

It is, therefore, clear that the \$1600 thus granted was not ordered to be paid as and for a salary as mayor for the then ending year, or as an officer of the corporation during that period, but as forming a substantial part of a complimentary recognition by the colleagues of Dr. Allen in the council of his services during the previous years he was councillor and mayor.

If the grant had been made by the council as a salary to Dr. Allen as mayor for the year 1870, and the sum a reasonable one, keeping in view the circumstances and population of the town, we would feel most reluctant to interfere in such a case. We assume that Dr. Allen stands entitled to and merits all the praise and eulogy bestowed upon him in the resolution for his services during the long period he was a member and head of the council, yet it seems to us to be a singular and unprecedented proceeding for the members of a town council, upon the eve of their dissolution, and as their last act as a council, to grant to one of their colleagues an amount equal to one half of the whole amount of the tax assessed and collected during the year because that gentleman had signified his intention of no longer acting as mayor. Assuming that the act itself was not illegal, yet considering the revenue and population of the town, it was a most extravagant appropriation of the people's money. The past gratuitous services of Dr.

Allen is no reason why the present taxpayers of the town should be made to pay, without their sanction at least, so large an amount in proportion to the revenue of the town for services rendered years previous, and which their predecessors had the full advantage of, and for which, if Dr. Allen was entitled legally to be paid, the remuneration should have been voted and provided annually, as the duties were rendered.

As said by Sir John Robinson, C. J., in the case of the *Municipality of East Nissouri v. Horseman*, 16 U. C. R. 583: "The municipal council is not to be confounded with the corporation; it is the governing body acting on behalf of the corporation for the year. It is, moreover, a fluctuating body, the council for one year not being identical with the council of another year, and not to be so looked upon, in my opinion, even though it should happen to be composed of the same persons." And, as said by Burns, J., in the same case: "The members or councillors composing the council are not the corporation; they are the agents of the corporation for the management of the affairs and funds of the corporation."

By sec. 228 of the Municipal Act, 29-30 Vic. ch. 51, the duty of the town council is to assess and levy on the whole ratable property a sufficient sum in each year to pay all valid debts of the corporation falling due within the year. In this case it is clear there was no debt, nor was it pretended that there was any debt due to Dr. Allen by the corporation, and we take it that the members of the council could not, by simply passing a resolution, create a debt against the corporation, or, in other words, vote away the public moneys at their mere pleasure.

Mr. Bethune, however, on the argument rested his justification of the act of the members of the council upon the ground that the 176th section of the Municipal Act authorized the payment of a salary to the mayor, as being an officer of the council or corporation, and that we might read the by-law and resolution together as shewing that such was the case, and the amount was in remuneration

for his services for the year 1870. And he relied upon the 123rd section as shewing that the mayor was an officer of the corporation, and within the meaning of section 176.

Section 123 says that the mayor shall be deemed the head of the council, and the head and chief executive officer of the corporation ; and the 176th section enacts that " In case the remuneration of any of the officers of the municipality has not been settled by Act of the Legislature the council shall settle the same, and the council shall provide for the payment of all municipal officers, whether the remuneration is settled by statute or by by-law of the council." That section, and the following section, 177, is headed, " Salaries and continuance in office ;" and the 177th section provides that the treasurer may be paid a salary or percentage, and that all officers appointed by a council shall hold office until removed by the council, &c.

After a careful examination of the various sections of the Municipal Act bearing on the question, we cannot come to the conclusion that the word " officer" in the 176th section was ever meant or intended to include the mayor as one of the officers to be remunerated. We do not think that the use of the words " chief executive officer," in the 123rd section, was necessary to constitute the mayor an officer of the corporation. The word " officer" has a very wide meaning and signification. The reeve and deputy-reeve of towns are also officers in the same sense, and, in fact, all the members of the council are officers of the corporation. It is laid down in *Bacon's Abridgment*, " Offices and Officers, A," in treating of the several kinds of offices, " That every man is a public officer who hath any duty concerning the public ; and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority."

Our Municipal Act, in referring to contested elections, in the 131st section, uses these words : " One month after the acceptance of office by the person elected," and the dis-

claimer provided by the 12th and 17th sub-sections are disclaimers to the office of councillors, and so in all matters relating to proceedings by *quo warranto*, the offices of mayor, alderman, &c., are referred to.

We therefore think, that if we were to hold that because the mayor is designated the chief officer he is entitled to be remunerated under the authority of the 176th section, we see no good ground why every reeve, deputy-reeve, and member of the council is not also entitled as coming within the expression "any of the officers of the municipality" mentioned in the 176th section; and in this respect what is said by Sir John Robinson, C. J., in *Wright and The Municipal Council of the Township of Cornwall*, 9 U.C.R. 442, has great force. In commenting upon the effect of a similar section in the former Municipal Act, 12 Vic. ch. 81, the Chief Justice says, "Are township *councillors* included in the words 'township officers' used in this clause? We think it plain they are not. If there were nothing in any other part of the statute to shew what was intended, I should find it difficult to hold that they were included, for when we speak of the officers of a legislative body we do not in general mean to include the members of that body; and when we consider there is no other authority required to concur with the township council in passing their by-laws, it does not seem probable that it could have been intended to allow them by their own votes to divide as much of the public revenue among themselves as they pleased. If the Legislature had intended to give them the power of voting salaries or allowances to themselves they would surely have provided some check upon the exercise of that power, and their not having done so is a convincing proof that they did not conceive that they were delegating any such authority to them."

The 177th section, which immediately follows the 176th and under the same heading, after providing how the treasurer might be paid, goes on to say that all officers appointed by the council shall hold office until removed by the council. Now, under these words, *all officers*, &c., it

never was intended that it should include the mayors of cities, who are officers appointed by the council.

In our judgment the authority to remunerate officers given by the 176th section points only to those officers and persons employed by the corporation, and engaged in and about the transacting of its business and affairs, and does not include or refer to any member of the governing body.

We think it only reasonable and proper to hold, that if the Legislature had intended that the mayors of towns should be salaried officers, or that the council might appropriate as they thought proper any allowance or sum of money out of the corporation funds to them, it would have so expressly provided.

In the English Municipal Act, 5 & 6 Wm. IV. ch. 76, express authority is given by section 58 to the council to give the mayor such salary as the council shall think reasonable—in my opinion a very proper provision. The office of mayor is, in many cases, a very onerous and responsible position, and one which involves the incumbent in many obvious and unavoidable expenses.

We also see, from the provisions of the Municipal Act, that the attention of the Legislature was drawn to the subject of remunerating the members of the county and township councils, and as it made no provision whatever or extended such a power to the councils of cities and towns, we ought to hesitate, in the absence of an expressed intention, to assume or imply the existence of a power which is so open to abuse, and may be used by the members of a council in granting large amounts of corporation funds, such as in this case, to gratify the personal feeling of the councillors. It is for the Legislature expressly to enact whether such a power was to be given. If we have taken a wrong view in this respect of the provisions of the Municipal Act there can be little difficulty in obtaining a legislative declaration of the intention of Parliament.

On the whole, we are of opinion that the rule should be made absolute : first, on the ground of the appropriation of

\$1600 being a most extravagant and unreasonable one, and out of all proportion to the revenues of the town; and, second, that neither in the by-law nor the resolution does it appear with any certainty for what services the amount was granted; and on the further ground, that we do not think that the members of the council had any authority, under the Municipal Act, to order the payment of the \$1600 out of the corporation funds, on the grounds mentioned in the by-law or resolution.

The rule will be absolute for quashing and setting aside so much of the by-law as authorizes the payment of the \$1600 to Dr. Allen, and also so much of the resolution of the same date granting said sum to Dr. Allen, and authorizing the chairman to sign an order on the treasurer, with costs.

Rule absolute.

PATTERSON ET AL V. FULLER ET AL.

Replevin—Verdict as to part—Action on replevin bond.

Where a plaintiff in replevin succeeds only for part of the goods replevied, and a return is adjudged as to the rest, he is liable upon the replevin bond for not prosecuting the suit with effect as to the goods for which he failed, and for not returning them.

DECLARATION.—That the defendants by their bond, dated 31st March, 1868, became bound to J. F., sheriff of the County of Lambton, in \$6000, to be paid, &c., subject to the condition that if the defendant Fuller and his wife should prosecute a certain action of replevin in the said Court of Queen's Bench against the said plaintiffs with effect and without delay, for the taking and unjustly detaining of the goods and chattels of the said Fuller and his wife, to wit, 3000 pieces of timber and 10,000 pipe staves, and should pay such damages as the said plaintiffs might sustain by the issuing of the writ of replevin in the said suit, in case the said Fuller and his wife failed to recover judgment in

the said action of replevin; and if the said Fuller and his wife should make a return of the said goods and chattels, if a return thereof should be adjudged; and further, if the said Fuller and his wife should observe, keep, and perform all rules and orders made by the said Court in the said action of replevin, then the said bond should be void. And the plaintiffs allege that the said sheriff executed the said writ of replevin, and replevied thereunder to the plaintiffs in the said action 200 pieces of the said timber and 10,000 pipe staves, and the said Fuller and his wife did not prosecute the said action of replevin with effect, and did not make a return of the said property, although a return thereof was adjudged in the said action to the now plaintiffs, and did not pay the damages sustained by the said plaintiffs by the issuing of the writ of replevin in the said action, but therein made default, in this, that the said Fuller and his wife failed to recover judgment in the said action of replevin for 157 of the said pieces of timber replevied by the said sheriff therein, and for 9000 of the said pipe staves so replevied; and as to the said 157 pieces of timber and 9000 pipe staves judgment was recovered in the said action in favor of the now plaintiffs, and a return of the said 157 pieces of timber and 9000 pipe staves was adjudged to the now plaintiffs; but the said Fuller and his wife did not make a return of the said 157 pieces of timber and 9000 pipe staves, or of any part thereof, but therein made default, and the plaintiffs were deprived of and lost the value of the said 157 pieces of timber and 9000 pipe staves, and sustained further damage by the issuing of the said writ of replevin by being deprived of the possession of the said timber and pipe staves, and in consequence thereof the said plaintiffs were unable to fulfil a contract for the sale of the said timber and staves, which they had entered into with a certain firm in the City of Quebec, in the Province of Quebec, at the time when the said timber and staves were so replevied, and the plaintiffs became liable to make compensation to such persons for the breach of the said contract, and were forced and obliged

to pay a large sum of money for the hire of a certain vessel, which at the time of the said timber and staves being so replevied as aforesaid the plaintiffs had chartered to convey the said timber to Quebec aforesaid in pursuance of the said contract, and the plaintiffs lost large profits which they would otherwise have made by the sale and possession of the said timber and staves had the same not been replevied in the said action ; and the defendants did not pay the damages so sustained by the now plaintiffs by the issuing of the said writ of replevin, or any part thereof—whereby the said bond became forfeited to the said sheriff, who thereupon afterwards assigned the same by deed to the now plaintiffs, according to the form of the statute in such case made and provided.

Demurrer to the first and third assignment of breaches, on the grounds :

1. The declaration shews that the said suit was prosecuted with effect, and that the plaintiffs therein recovered judgment.

2. The alleged damages are too remote, and not damages of the character contemplated by the conditions of the bond.

C. S. Patterson, for the demurrer. The condition of the bond is to prosecute the suit with effect, which means to a not unsuccessful termination : *Welsh v. O'Brien*, 28 U. C. R. 408 ; and this the plaintiffs in replevin did. They succeeded as to a substantial portion of the goods, and to this extent the suit was effectual and successful. The bond, which in favor of the sureties should be strictly construed, does not require that the plaintiff shall succeed as to all the property replevied.

Robinson, Q. C., contra, cited *Haggart v. Kernahan*, 17 U. C. R. 341 ; *Miller v. Miller*, 17 C. P. 226.

MORRISON, J., delivered the judgment of the Court.

The contention of the defendants on the demurrer is, that although it appears on the face of the declaration that the now defendants, Fuller and his wife, in their

replevin suit against the now plaintiffs only recovered for a portion of the goods claimed by defendant Fuller and his wife, and replevied to them by the sheriff, and the now plaintiffs recovered judgment for the remaining portion of the goods so replevied, that upon the replevin bond given to the sheriff under the Statute these defendants stand acquitted, as it thus appears the plaintiffs in the replevin action prosecuted their suit with effect and recovered a judgment.

We cannot accede to this view. This Court, in *Haggart v. Kernahan*. 17 U. C. R. 341, decided that in a replevin suit under our statute the verdict is divisible, so that the plaintiff may recover for whatever part of the goods he proves himself entitled to, and the defendants for the rest. And in *Miller v. Miller*, 17 C. P. 226, that decision was upheld; and in this latter case my brother Wilson, who delivered the judgment in that Court, says, "Our statute placing this action on the same footing as trespass or trover would, if there had been any doubt of the matter, have been probably sufficient to enable us to determine that question in favor of the plaintiff; but, apart from the statutes, we cannot see how any doubt can arise with respect to it. If the taking of a single seizable article could do away with the exemption of every properly privileged article, there would practically be no longer any privilege whatever. All the claimant would have to do would be to take privileged goods to the extent of his demand, and an unprivileged article of the fiftieth part of the value of it, and then defend the whole seizure by the single article rightfully taken, although all the rest of it was unlawfully taken."

And so in a case of the kind before us, a party may sue out a writ of replevin having a right of property in one stick of timber, and claim and have replevied to him that stick and one hundred other sticks of timber belonging to the defendant in replevin, give a bond to the sheriff under the statute for the return of the 101 sticks, &c., and on his recovering in the replevin action for the one piece only,

according to the defendants' contention no action on the bond would lie. Such a proposition on its face is quite untenable. We cannot think that so unreasonable a result was intended by the statute, or that such is the effect of the language of the bond. The condition of the bond is, that if the plaintiffs in the replevin suit should prosecute their action with effect, &c., for the taking &c., of the goods of the now plaintiffs. What goods? All the goods replevied by the sheriff to the defendants, not a portion of them. If the plaintiff in replevin only recovers for a portion of them it can hardly be said he prosecuted his suit for all the goods with effect, within the meaning of the bond and its condition, otherwise, as said in *Miller v. Miller*, the recovery of one article out of fifty replevied would satisfy the bond.

The second condition of the bond is, and shall pay such damages as the now plaintiffs might sustain by the issuing of the writ of replevin in such suit, if the plaintiffs in replevin failed to recover judgment in the said action of replevin—that is, the action to determine the right of the plaintiffs in replevin to all the goods mentioned in the bond, and claimed and replevied to them, not, as I remarked before, to a portion of them. And as the Courts have decided that the pleadings and the finding in replevin are divisible, the parties to the replevin suit being both actors, and both entitled to judgment for the goods they may respectively prove themselves entitled to, we think that before the plaintiff in replevin and his sureties can relieve themselves from their bond to the sheriff, the plaintiff in replevin must recover a judgment in the replevin suit for *all* the goods and chattels replevied to him; and if he fails to do so, and the defendant in replevin recovers for a portion of the goods, and a return for that portion is adjudged to him, the plaintiff in replevin *pro tanto* has failed to recover a judgment in that suit, within the meaning of the condition and the 5th section of the Replevin Act of 1860, 23 Vic. ch. 45. And so, in our opinion, the condition in the bond is not satisfied, and the defendants in replevin in this case, the now plaintiffs, are entitled to bring an action on the

bond as a remedy to recover the value of those goods so adjudged to have been wrongfully taken from them by virtue of the writ of replevin, and such damages as they may have sustained by the issuing of the writ; and we therefore think that the plaintiffs are entitled to our judgment on the demurrer to the first breach.

Another exception was taken to the third breach assigned, but as nothing was said in support of the demurrer we have not thought proper to consider the exception, and the plaintiffs will also have judgment. Our present opinion is that the damages referred to are too remote, but we give no judgment on the point.

Judgment for plaintiffs.

PACAUD V. McEWAN.

Replevin bond—Action for refusal to assign—Damages.

Action against the sheriff for not assigning a replevin bond. It appeared that one H. originally owned the goods replevied, which were wrongfully taken from him and sent to Windsor. There they were replevied by H. from the Great Western R. W. Co., who held them for one P., the defendant in the replevin suit. P. assigned the goods to F. H., who sued the R. W. Co. in the State of Michigan, and recovered their value, which the company paid. The company then sued the sheriff for taking the goods, but failed, the verdict being that the goods when replevied belonged to H., not to P. H. did not go on with the replevin suit, and P., for the benefit of the R. W. Co., claimed an assignment of the bond, which the sheriff refused to give. *Held*, that only nominal damages could be recovered, for P., not being the owner of the goods, could not recover their value.

ACTION against defendant for not assigning to the plaintiff the bond taken by defendant, as sheriff, in the replevin suit of Moses E. Hart against the present plaintiff, conditioned for prosecuting the said suit with effect and without delay; and averring that Hart had not prosecuted his suit with effect and without delay, nor did he make a return of the goods.

The pleas were: 1. Not guilty. 2. That the plaintiff did not apply to defendant to assign the bond as alleged.

3. That defendant did not replevy the goods from the plaintiff as alleged. There was a fourth plea, to which there was a demurrer, and judgment given on it for the plaintiff. See 30 U. C. R. 550.

The plaintiff joined issue on the first and second pleas, and he replied to the third plea, by way of estoppel, the defendant's return to the writ of replevin, that he had executed the writ by delivering the property as commanded, and by serving a copy of the writ; on which the defendant joined issue.

The cause was tried at the last Assizes at Hamilton, before Galt, J., when a verdict was entered for the plaintiff, and damages assessed at \$828.88. The defendant made default at the trial.

Prince, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, on the ground that since the trial evidence had been discovered which could not have been adduced at that time, and which if adduced would have entitled the defendant to a verdict, or would at all events have reduced the plaintiff's claim to a nominal sum; the goods of which a return is claimed not having been the goods of the plaintiff, but of one Hall, and the said Hall having recovered their value from the Great Western Railway Company, from whose hands they were replevied; or why the verdict should not be reduced to nominal damages, or the plaintiff be restrained from levying more than nominal damages and costs in respect thereof, the said bond not being a bond on which damages can be assessed.

Burton, Q. C., shewed cause. The plaintiff is suing for the benefit of the Great Western Railway Company, which has been obliged to pay the value of the goods to one Hall, the assignee of Pacaud, the plaintiff, by proceedings taken against the Railway Company in the State Court of Michigan. This action should be allowed to go on to enforce indemnity for them, in the same way as an insurance company may prosecute in the name of the insured to recom-

pense themselves by way of damages for the wrong which the person causing the loss to the insured has occasioned to him and the company. The case of *King v Kelk*, 20 L. T. N. S. 974, shews that the courts do not readily grant a new trial when a party has not properly prepared for the trial.

Robinson, Q. C., supported the rule. This being a replevin bond, the defendant may ask the Court by its equitable power in such a case to grant him any relief he may be entitled to. The Court should see that no injustice is suffered on such a bond, and it is clear that the plaintiff here is not entitled to the present verdict.

WILSON, J., delivered the judgment of the Court.

This record shews in the fourth plea, which was demurred to, that the plaintiff had recovered before the commencement of this suit the value of the goods in an action which he had brought against the Railway Company.

That action, as the papers produced now shew, was not brought by the plaintiff, but by one Frederick Hall, the assignee of the goods from Pacaud, and was brought in the Circuit Court for the County of Wayne, in the State of Michigan, in or about the year 1867.

The facts of a suit having been brought by some one in the State Courts of Michigan against the Railway Company, and a recovery had thereon, were known to the parties concerned in the suit and in the other suits connected with the goods that were in dispute long before the commencement of this suit, and there was no pretence for saying, as the rule says, that evidence had been discovered since the trial which could not have been adduced at the trial.

We cannot interfere on that ground.

The main questions are, whether on the facts of the case the plaintiff is entitled to recover anything on the bond, and if he is, how much?

The facts are very well known, and have been stated at length in one or more of the many suits which have grown

out of the original wrongful taking of the goods in the province of Quebec.

Hart originally owned the goods ; they were wrongfully taken from his possession and sent to Windsor in this province. At that place they were in the storehouse of the Great Western Railway Company, held for Pacaud. Hart got the goods by his writ of replevin against Pacaud out of the storehouse of the Railway Company. Pacaud assigned the goods, how does not appear, to one Frederick Hall. This fact has only in the course of this suit been communicated to the Court. Hall sued the Great Western Railway Company in one of the Circuit Courts in Michigan, and recovered against them the value of these goods, how or why we do not know, for they were not to blame in the goods being taken from their custody by the sheriff.

The Great Western Railway Company then sued McEwan for taking the goods from their custody on the replevin writ against Pacaud, 28 U. C. R. 528, and the Court determined that the sheriff had no right to do so. That case was then tried on the issues in fact, and the learned Chief Justice of the Common Pleas, without a jury, whose finding we affirmed lately (*a*), decided that the goods at the time of replevying them from the custody of the Railway Company were the property of Hart, the plaintiff in replevin, and not of Pacaud, the defendant in replevin.

The result has been, Hart, the true original owner of the goods, got them again by the writ of replevin. Pacaud assigned his claim on the goods to Frederick Hall, and we presume was paid by him. Hall sued the Great Western Railway Company in Michigan, and recovered the value of the goods from and has been paid by them. The Railway Company have paid for the goods, which they have not got, and are thus total losers. Hart never prosecuted his replevin suit, resting satisfied with his actual recovery of the goods. Pacaud, not for himself but for the Railway Company, claims to have the bond assigned to him, in

(*a*) See *Great Western R. W. Co. v. McEwan*, 30 U. C. R. 559.

order that he may proceed against the parties to it for not having prosecuted their suit with effect. The sheriff has refused to assign it, and Pacaud has brought this action against the sheriff for not assigning the bond.

Hart did make default in prosecuting his suit without delay; he could probably have done so with effect, and it is very improbable that a return of the goods would ever have been adjudged against him. In the action which the Railway Company brought against the sheriff, the real question was, whether Hart or Pacaud was the owner of the goods at the time of the replevin, and the finding and determination were that they were the property of Hart, and not of Pacaud.

That being so, the Railway Company, as beneficial plaintiffs in this action, cannot recover more than Pacaud is entitled to, and that is not the value of the goods, because he was not the owner of them, but damages for the replevin suit not having been prosecuted without delay.

It was pointed out in giving judgment on the demurrer in this case, that the condition as declared on does not provide for the return of the goods in any event. Even if it had it would not, in my opinion, have made any difference.

Under the facts, the plaintiff can recover no more than for the damage he has sustained, and that is nothing for the non-return of the goods, because they were not his, but compensation only for the neglect to prosecute the suit against him.

Whether the damages are to be assessed by a jury or are assessable by the Court, by reason of its equitable powers in such cases, we are of opinion that not more than nominal damages can be assessed in this case on the bond.

These facts did not all appear on this trial, and as they did not we must send the case down to another trial to have them brought out. We do not decide that the case should be or must be tried at *Nisi Prius*, or that the Court could not deal with the case at once. We only remit it to the tribunal the parties have adopted, leaving that choice at their risk if anything should turn upon it.

The rule will therefore be absolute to set aside the verdict, and for a new trial, on payment of costs by the defendant.

Rule absolute.

IN RE ROBERT MADDEN.

Appeal from Q. S.—Power to give costs—33 Vic. ch. 27, sec. 1.

Under 32-33 Vic. ch 31, sec. 65 and 33 Vic. ch. 27 D., the Court of Quarter Sessions has no power to award costs on discharging an appeal for want of proper notice of appeal, for the words "shall hear and determine the matter of appeal" mean decide it upon the merits.

IN Hilary Term last *Holmested* obtained a rule calling upon Robert Madden to shew cause why the order of Mr. Justice Gwynne, made on the 7th February, 1871, directing a writ of prohibition to issue to William Henry Wilkison, Esquire, Chairman of the General Sessions of the Peace for the County of Lennox and Addington, should not be rescinded, and all proceedings had thereon, on the ground that the Court of General Sessions had power to make the order for payment of costs by the said Robert Madden, and to estreat the recognizance in the Judge's order referred to.

The facts were that Robert Madden on the 23rd of March, 1870, was convicted before James C. Huffman, a Justice of the Peace for the County of Lennox and Addington, for unlawfully and wilfully passing with a team of horses and vehicle the toll gate on the Kingston Road east of Napanee, without first paying the legal toll, and refusing to pay the same after a demand made, contrary to the statute.

Madden served a notice of appeal to the General Sessions of the Peace on the 25th March, on the prosecutor, Files, the toll-gate keeper, and on the convicting magistrate.

At the June Sessions, when the case was called on it was objected that the notice of appeal was not sufficient under the Dominion Act 32-33 Vic., ch. 31, and the chairman of the sessions sustained the objection and dismissed the

appeal, with costs to be paid by the appellant to the clerk of the peace on or before the 1st of July, 1870.

The appellant's counsel objected to the judgment as respected the costs, because the appeal having been dismissed for the want of service of the notice of appeal the Court had no jurisdiction to award costs.

In this term *Osler* shewed cause. He referred to the Act 32-33 Vic. ch. 31, secs. 65, 66, 69: *Regina v. Padwick*, 8 E. & B. 704, which referred to the two Imperial Acts, 5 & 6 W. IV. ch. 50, and 12 & 13 Vic. ch. 45; *The King v. The Justices of the West Riding of Yorkshire*, 3 T. R. 776.

Holmested supported the rule. The Court had more jurisdiction here than in the case of *Regina v. Padwick*, 8 E. & B. 704, for there the Court had no jurisdiction over the subject of appeal at all, while here it had, and therefore could more properly award costs.

WILSON, J., delivered the judgment of the Court.

The General Sessions of the Peace, it seems well settled, have no power to award costs on appeals unless expressly authorized by statute to do so.

Under the Imperial Statute 5 & 6 Wm. IV., ch. 50 sec. 105, the sessions had power to give costs "upon hearing and finally determining the matter of such appeal," that is, deciding it upon the merits; and a case dismissed because the Court had no jurisdiction to entertain it was not a case in which the Court, under these words of the statute, could award costs. Under the 12 & 13 Vic. ch. 45, sec. 5, which gave power "upon any appeal, * * the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as to such Court may appear just and reasonable," the Court could award costs of an appeal brought which the Court had no jurisdiction to entertain. In such a case the decision could not be on the merits. A decision that no appeal lies will justify the awarding of costs.

The Dominion Act, 32-33 Vic. ch. 31, sec. 65, referred to on the argument, was repealed by the 33 Vic. ch. 27, sec. 1, and re-enacted with some amendments.

This notice of appeal was served in March. The amending Act was passed on the 12th of May, and the appeal was dismissed in June.

It is of no consequence under which Act the case is considered, for the words applicable to costs are precisely the same in both Acts. They are that "the Court shall hear and determine the matter of appeal, and make such order therein, with or without costs to either party, as to the Court seems meet."

The question is, what is the meaning of the words "the Court shall hear and determine the matter of appeal." They are very similar to those used in the Imperial Act 5 & 6 Wm. IV., ch. 50, "on hearing and finally determining the matter of such appeal," on which language the Court in *Regina v. Padwick*, 8 E. & B. 704, declared the sessions had no power to adjudge costs when they dismissed an appeal because they had no jurisdiction to try it, or when the case was disposed of not upon the merits.

We have no reason to be dissatisfied with that decision; it appears to be expressly in point; and we must therefore affirm the order of the learned Judge awarding the prohibition, and discharge this application with costs.

Rule discharged.

REGINA V. JUSTICES OF HURON.

Abandonment of rule nisi—Costs.

Where after a rule *nisi* for a mandamus had been served, the applicant gave notice that it would not be proceeded with, but did not offer to pay any costs, the Court on application discharged the rule with costs up to the time of the notice, and costs of said application.

A RULE *nisi* was obtained, returnable on the first day of Easter term, calling upon the Justices to shew cause why

a mandamus should not issue commanding them to enter continuances in a certain appeal, and to quash their order dismissing said appeal.

During the same term, *Robinson*, Q. C., who appeared for the Justices on whom the rule had been served, moved to discharge the rule with costs. It appeared that after service of the rule notice was given by the solicitors of the applicant that the rule would not be proceeded with, but no offer to pay costs was made. He referred to 28 Vic. ch. 18, sec. 6; *Ch. Arch. Prac.* 12th ed., 1583-4.

MORRISON, J., delivered the judgment of the Court.

In this case Mr. Robinson moves to discharge the rule *nisi* obtained herein, and he asks it to be discharged with costs. The practice seems to be, that if a party obtaining a rule takes it out and serves it, he cannot be compelled to proceed with it, and Mr. *Archbold*, in his *Practice*, 12th ed., p. 1583, says it would seem that he may abandon it, even after service of it, on giving notice of abandonment, and paying or offer to pay any costs which may have been incurred in consequence of the rule. As we understand, in this case, after service of the rule, the applicant's attorney intimated to the opposing party that he did not intend proceeding on the rule, but the party who obtained the rule made no offer to pay the incidental costs. We think, in such a case, the party called upon to shew cause may come in and have the rule discharged with costs, as was done in the case of *Doe Harcourt v. Roe*, 4 Taunt. 883; and that this rule should be discharged with such costs as the Master may find incurred up to the time of the notice of abandonment, and also the costs of attending and moving to discharge the rule.

Rule discharged with costs.

REGINA V. McDONALD.

Quarter Sessions—Jurisdiction.

The Court of Quarter Sessions has no jurisdiction to try the offence of forgery.

Semble, that on the evidence, stated below, the testimony of the prosecutor, whose name had been forged to a note, was sufficiently corroborated.

THE prisoner was convicted at the Quarter Sessions for the County of Elgin of forgery of a promissory note, purporting to be made by one Daniel Marlatt, Jr., on the 22nd November, 1870, for \$125, payable six months after date to John Fisher or bearer.

The evidence, so far as material, was to the following effect: Daniel Marlatt said that the prisoner and one Tisdale came to his house on the 23rd November, and got him to consent to become Tisdale's agent for the sale of horse-rakes in the township of Yarmouth, and to write his name and post-office address on a blank piece of paper, so that they might know it. The note produced, he said, had the name thus written to it, the address having been torn off. The body of the note was not in his writing, nor the initials on the stamp, "D. M." Tisdale, when he came to the witness, represented himself to be one John King, living at Chatham, but it was afterwards discovered that his name was J. C. Tisdale, and that he lived at or near Brantford.

John Marlatt, the father of the last witness, swore that the signature to the note was in his son's handwriting, but the rest of the note was not.

It was proved also that Tisdale offered the note for sale to one Munro, and the prisoner, who was with him, said he had seen Marlatt sign it. The prisoner, on the same evening, told Mr. Munro that he had just seen King go away by the train, and he produced an order requesting Mr. Munro to give him, prisoner, the note or the money for it. On being questioned by Mr. M. about the note, he repeated that he had seen Marlatt sign it; that it was read over to

him, and he understood it, and that it was given for a patent right for an instrument for pruning trees; and at Munro's request he put his name to it as a witness. It was proved also that Tisdale did not go by the train, as the prisoner had stated; and that the prisoner made other untrue statements to Mr. Munro, in representing that he knew Tisdale and that he lived at Chatham.

The learned Chairman, the Judge of the County Court, reserved a case for the consideration of this Court, whether the prosecutor, upon whom the forgery was committed, had been sufficiently corroborated in his testimony to warrant a conviction, and whether the Court of Quarter Sessions had jurisdiction over the offence of forgery.

Scott, for the Crown. He submitted that the Quarter Sessions had not jurisdiction to try the offence of forgery: *Rex v. Higgins*, 2 East 5; *Regina v. Dunlop*, 15 U. C. R. 118; *Dickinson's Q. S.*, 6th ed., p. 156; Provincial Act, 7 W. IV. ch. 6, sec. 2. But if the Court should think otherwise, then he contended the prosecutor had been corroborated so as to give his testimony effect, under sec. 54 of the late Act, 32-33 Vic. ch. 19: *Regina v. Giles*, 6 C. P. 84; *Rose v. Cuyler*, 27 U. C. R. 270.

No one appeared for the prisoner.

WILSON, J., delivered the judgment of the Court.

There are circumstances in this case distinguishing it from those in *Regina v. Giles*, 6 C. P. 84, which would, we think, be a sufficient corroboration of the testimony of the prosecutor as to the principal fact against the prisoner.

The question of jurisdiction appears to be an objection to the maintenance of this conviction.

The Court of Quarter Sessions is not properly an Inferior Court. It is a Court of Oyer and Terminer, and a Court to which a *venire de novo* may be awarded by the Queen's Bench: *Campbell v. The Queen*, 11 Q. B. 799, 814.

It is, however, a Court which does not possess any greater powers than are conferred upon it by statute.

It has authority over offences attended with a breach of the peace. When a breach of the peace has been committed, its jurisdiction is said to be very extensive.

Perjury and forgery not being attended with a breach of the Peace, the Court of Quarter Sessions cannot try. There are many cases to that effect: 2 *Hawk.* P. C. ch. 28, sec. 64; *Regina v. Yarrington*, 1 Salk. 406; *Rex v. Haynes*, R. & M. 298; *Rex v. Higgins*, 2 East 5; *Butt v. Conant*, 1 B. & B. 548; *Ex parte Bartlett*, 7 Jur. 649; and *Regina v. Dunlop*, 15 U. C. R. 118, in our own Court.

The Sessions of the Peace cannot, by the Dominion Act, 32-33 Vic. ch. 20, sec. 48, try the offences specified in the 27th, 28th, and 29th sections of that Act. A similar provision is made by ch. 21, sec. 92, as to certain offences under it.

By ch. 29 of the same year, sec. 12, "no Court of General or Quarter Sessions, or Recorder's Court, nor any Court but a Superior Court having criminal jurisdiction, shall have power to try any treason or any felony punishable with death, or any libel."

The exceptions contained in the last three named statutes, and the excepted cases of forgery and perjury, define as nearly as may be what the general jurisdiction of the Sessions of the Peace is; the unexcepted offences they may try.

Judgment was not pronounced on the prisoner. The order we make therefore is, that an entry be made on the record that in the judgment of the Justices of this Court the prisoner, William McDonald, ought not to have been tried or convicted on the said indictment for or of any of the offences therein contained, inasmuch as the said Court of the Sessions of the Peace had no power or jurisdiction over the said offences or any of them.

Judgment for defendant.

WALKER V. SHARPE.

Horse let to another—Injury to—Right of owner to sue.

The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall. *Held*, that the plaintiff might maintain an action therefor.

THIS was an action brought in the County Court, against the defendant as an innkeeper, to recover the value of a horse belonging to the plaintiff, which was strangled in defendant's stable.

The case was tried before Morrison, J., at the Spring Assizes for 1870, at Walkerton.

It appeared on the trial that one Stoney hired or borrowed the horse from the plaintiff at Walkerton, to drive him to Seaforth, some forty-eight miles; that at Seaforth Stoney put up at defendant's hotel, and the horse was put into defendant's stable about 9, p.m., Stoney ordering the horse to be taken care of until he returned from Buffalo, which would be in three or four days. Stoney remained at the inn that night. On the following morning he accidentally went into the stable and found the horse dead; he was lying on his right side, head under the shoulder, and his right fetlock over the halter, which was about seven feet long.

At the close of the plaintiff's case, defendant's counsel objected that the right of action, if any, was not in the plaintiff, but in Stoney; and that there was no evidence of negligence.

The learned Judge would not stop the case, and defendant called witnesses to rebut any negligence, it being suggested that the horse must have put up his foot to scratch his head, and so got his foot entangled with the halter and strangled. Evidence had been given for the plaintiff, to the effect that it was not safe to tie the horse up with so long a halter as the one in question. The defendant himself admitted that by appearance the halter was a long one.

The case was left to the jury to say whether the horse came to his death through negligence on the part of the defendant's servant in tying up the horse, and if they so found, then to say the amount of damages; if otherwise, to find for defendant.

The jury found the horse's death was occasioned through negligence in tying him up, and they assessed the damages at \$50; and, as previously agreed, a nonsuit was entered, with leave to the plaintiff to move to enter a verdict for him for the amount, if the Court should be of opinion the plaintiff was entitled to maintain this action.

In the following term *Harrison*, Q. C., obtained a rule *nisi* accordingly.

During Michaelmas Term last, *Robinson*, Q. C., shewed cause. As to the evidence of negligence, it would seem that the presumption as against an innkeeper, where goods are injured at his inn, is that the damage was occasioned by his negligence: *Dawson v. Chamney*, 5 Q. B. 164; and that he is responsible even although diligent: *Morgan v. Ravey*, 6 H. & N. 265. This objection, therefore, is not now pressed. The nonsuit, however, proceeded upon the other ground, and is right. The plaintiff cannot sue, for the action, though in respect of a tort, is founded upon the contract between Stoney and the defendant, which the plaintiff was no party to, and could not have sued upon: *Add. T.* 14, 3rd Ed.; *Winterbottom v. Wright*, 10 M. & W. 109; *Blakemore v. Bristol and Exeter R. Co.*, 8 E. & B. 1049; *Howard v. Shepherd*, 9 C. B. 321, 322; *Alton v. Midland R. W. Co.*, 19 C. B. N. S. 213; *Tollit v. Sherstone*, 5 M. & W. 283; *Collis v. Selden*, L. R. 3 C. P. 495; *Robertson v. Fleming*, 4 Macq. H. L. 167; *Sharman and Redfield on Negligence*, 58. The principle is clear, that no one can acquire a right of action by means of a contract to which he was no party: *Alton v. Midland R. W. Co.*, 19 C. B. N. S. 240, and it applies most strongly here, for by reason of the contract and of the relation of innkeeper and guest created by it, the defendant is subject to an

unusual and more extended liability to the person with whom it was made. Negligence is presumed against him in favor of such person, and even diligence will not protect him. These rights cannot accrue to the benefit of the plaintiff, with whom defendant had no privity or dealing of any kind.

Harrison, Q. C., contra.—The action will lie. There would otherwise be a wrong without a remedy, for the plaintiff could not sue Stoney: *Robertson v. Brown*, 1 U. C. R. 345; *Wilson v. Brett*, 11 M. & W. 113; *Heald v. Carey*, 11 C. B. 993; *Dean v. Keate*, 3 Camp. 4; *Tollit v. Sherstone*, 5 M. & W. 283. Stoney in this case may be considered as the agent or bailee of the plaintiff, so that the plaintiff is not wholly a stranger to the defendant, and the mere temporary interest of Stoney cannot prevent the plaintiff from recovering for the permanent loss of his property caused by defendant's negligence: *Mears v. London and South Western R. W. Co.*, 11 C. B. N. S. 850. *Tancred v. Allgood*, 5 H. & N. 438; *Indermaur v. Dames*, L. R. 1 C. P. 274; *Collett v. London and North Western R. W. Co.*, 16 Q. B. 984.

MORRISON, J., delivered the judgment of the Court.

The principal contention on the part of the defendant is, that the plaintiff cannot maintain this action against the defendant, for if the defendant was liable at all it is to Stoney, who brought the horse to the defendant's stable. At the trial I was inclined to think, as the plaintiff was not an actual guest of the defendant, that the defendant was not answerable to the plaintiff upon his Common Law liability; but after an examination of the authorities I think otherwise, for it is quite clear that to constitute a guest in point of law it is not necessary, in such a case as this, that the person should lodge at the inn.

In *Gelley v. Clerk*, Cro. Jac. 188, it was held, that "where one leaves his horse at an inn, to stand there by agreement at livery, although neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the

innkeeper hath a valuable consideration ; and if that horse be stolen, he is chargeable with an action, upon the common custom of the realm ;" but not so where he leaves goods. And in *Beedle v. Morris*, Cro. Jac. 224, where the person lodging at the inn was a servant of the plaintiff, it was objected that the custom of the realm was only for travellers, and that the master was not a traveller ; but it was adjudged that he might well have the action. See also *Bennett v. Mellor*, 5 T. R. 273.

And in *Yorke v. Grenagh*, 2 Ld. Raym. 866, the majority of the Court held, against Lord Holt, if a man leave his horse at an inn, though he lodge at another place, that makes him a guest ; the innkeeper is obliged to receive him, for the innkeeper gains by the horse, and that makes the owner a guest though he was absent. That was replevin for a horse which was brought to defendant's inn by a third party, and the innkeeper detained the horse, claiming a lien for keeping the horse, setting up his right at Common Law to detain the horse of his guest until paid. One of the objections taken was, that since the horse was brought to the inn by a stranger, the innkeeper cannot detain it for its meat against the right owner ; but the Court held, as already stated, the innkeeper gains by the horse, and that therefore makes the owner a guest, though he was absent. *Contra* of goods left there by a man, because the innkeeper has no advantage by them.

Irrespective of these cases, the case of *Mears v. London and South Western R. W. Co.*, 11 C. B. N. S. 850, is an authority in favor of the plaintiff's right to bring this action. Erle, C. J., in giving judgment, says, " This is an action brought by the owner of a barge, to recover damages for injury done to it by the negligence of the defendants' servants whilst it was out on hire to a third person. The question is, whether the owner of the barge has a right to maintain an action for that injury. In my opinion he has that right, the mere temporary outstanding interest in the hirer of the barge amounting to nothing, * * * Scott Russell, the hirer of the barge, having taken it to the

defendants' premises for the purpose of being loaded by their servants, the defendants cannot be said to be quite strangers to the plaintiff." And Williams, J., said, "It is true that the barge at the time was let out to Scott Russell for an unexpired term; but subject to Scott Russell's temporary interest in it, the barge still remained the property of the plaintiff; and I see no reason why the plaintiff should not maintain the action. * * * It seems to me, however, to be clear, that though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that, where there is a permanent injury, the owner may maintain an action against the person whose wrongful act has caused that injury." See also *Martin v. Great Indian Peninsular R. W. Co.*, L. R., 3 Ex. 9; *Becher v. Great Eastern R. W. Co.*, L. R. 5 Q. B. 241.

On the whole, we are of opinion that the plaintiff is entitled to maintain this action, and, as the jury found that the death of the horse was occasioned by the negligence of the defendant's servant, the plaintiff is entitled to have the verdict entered for him for \$50.

Rule absolute.

CASSIDY QUI TAM V. HENRY.

Declaration of partnership—33 Vic. ch. 20, O—Penal action.

Sec. 6 of 33 Vic. ch. 20, O., by which the declaration of the names, &c., of a partnership required to be filed under that Act is made incontrovertible, does not apply to the case of a penal action brought against a member of the firm for neglecting to file such declaration. The preamble and general tenor of the Act shew that it was intended for cases in which a claim is made against the firm, or in which the partnership is concerned.

Where, therefore, such declaration was filed on the 6th July, 1870, and stated that the partnership existed since the 23rd of August, 1869: *Held*, that it was competent for defendants to prove that in fact it was not formed until the 1st July, 1870, so that the declaration was filed in time.

THIS was an action brought to recover a penalty of \$200, under the provisions of the fourth section of 33 Vic. ch. 20, statutes of Ontario.

The declaration set out that at the time of the passing of that statute the defendant and one A. Henry were, and since, and still are co-partners for trading purposes, under the name of Henry Brothers, &c., and that it became and was the duty of the defendant to cause to be delivered to and filed with the registrar, &c., within six months after the passing of the said act, a declaration in writing signed by the defendant and his copartner, containing the names &c., of each and every partner of such copartnership, by the name or firm under which the defendant, &c., carried it on or intended to carry on such business, and the time during which the partnership had existed or was to exist, &c. Breach, that defendant did not cause any such declaration to be delivered to and filed with the registrar, &c., under and according to the provisions of the Act, whereby, &c.

Plea.—General issue, per Stat. 21 Jac. I., ch. 4 sec. 4.

On the trial at Napanee, before Galt, J., the plaintiff adduced testimony to shew that the defendant and his brother had been in partnership for some years, and that no change in their business was known to the witness; and it appeared that a declaration signed by the defendant and his co-partner, A. Henry, was filed with the registrar on the

6th July, 1870, declaring in the form given by the statute, that they carried on and intended to carry on the business of Printers, &c., and that the partnership had subsisted since the 23rd of August, 1869, and that they were and had been since the said day the only members, &c. This declaration was dated on the 6th July, 1870.

The brother and co-partner of the defendant was called on the trial, and he stated that the declaration was wrong, in stating that the partnership existed from the 23rd August, 1869; it should have been the 1st July, 1870; and in explanation he stated that there had been a previous co-partnership in the same business, in which his brother Robert was a partner, the name of the firm being Henry & Brothers, and that such partnership was dissolved, and that immediately after the dissolution, which took place about the 1st July, 1870, the witness and the defendant entered into partnership under the same style and firm of Henry Brothers. The witness further stated that he told the defendant on the 5th or 6th of July to have the partnership registered, and that the defendant brought him the declaration in question, which was in the handwriting of one Williams, and that he, witness, signed it without reading it.

The learned Judge told the jury if they were of opinion that the partnership was in existence from the 23rd August, 1869, to find for the plaintiff: that if the defendant and his partner formed a new partnership on the 1st of July, 1870, then the registration was in time: that in his opinion the defendant was not estopped from shewing the truth, as against a person suing as the plaintiff was doing: that sec. 6 of the statute had reference to claims, &c., made against the persons or partners named in such declaration, who, under the provisions of that section would be estopped from denying their liability as partners. This charge was objected to by the plaintiff's counsel, who contended that the sixth section concluded the defendant from shewing that the partnership did not exist from the 23d of August, 1869. The defendant had a verdict.

In Michaelmas Term last, *Holmested* obtained a rule *nisi* for a new trial, on the ground that evidence was received on the trial contradicting the allegations contained in the declaration, and on the ground of misdirection, in the learned Judge telling the jury that the defendant was not estopped from denying the truth of the allegations in such declaration.

During this term *C. S. Patterson* shewed cause. The breach of duty complained of is answered. The sixth section cannot apply so as to estop the defendant. The preamble clearly shews that the object of the statute was to enable persons suing a firm, or having claims against a partnership, to ascertain who must be made defendants, or who they were entitled to look to for payment. This is not such a case, but an action against an individual member of the firm. The Interpretation Act says the preamble of every Act may be looked to to explain it, 31 Vic. ch. 1, sec. 7, sub-sec. 39; see also *Halton v. Cove*, 1 B. & C. 558; *Winn v. Mossman*, L. R. 4 Ex. 292. Moreover, sec. 6 can apply only to a declaration filed in pursuance of the Act. Either this is such a declaration, in which case the action fails, or it is not, and is therefore not incontrovertible.

Holmested, contra. The preamble may extend but cannot restrain the enactment, as it is sought to do here: *Kearns v. The Cordwainers Co.*, 6 C. B. N. S. 388, 408; *Hughes v. Done*, 1 Q. B. 301; *Crespigny v. Wittenoom*, 4 T. R. 793; *Rex v. Pierce*, 3 M. & S. 66; *Trueman v. Lambert*, 4 M. & S. 239. Sec. 6 is clearly wide enough to cover this case. The declaration, it says, "shall not be controvertible as against any party by any person who shall have signed the same." It would have been difficult to make it stronger or more comprehensive. There is no warrant for any such restriction as is contended for, and although a penal act the true construction of it is not for that reason to be narrowed: *Rex v. Inhabitants of Hodnett*, 4 T. R. 96, 101; *Dwarris* on Stats. 634.

MORRISON, J., delivered the judgment of the Court.

The question raised on this rule is, whether the learned Judge was right in receiving the evidence excepted to, and in telling the jury that the defendant was not estopped in this action from shewing that the partnership of himself and his co-partner was erroneously stated to have commenced on the day mentioned in the declaration filed. The sixth section of the statute, upon which this question arises, is not very happily expressed. The language is confused, and it is somewhat difficult to comprehend the exact intention of the Legislature or the framers of the section.

The object of the statute is set out in the preamble: "Whereas it is expedient to remove the difficulties that exist in bringing actions against persons associated as partners for trading purposes, or against unincorporated companies or societies formed for like purposes : Therefore," &c.

It is, we think, very manifest that the purpose of the Act was to provide a mode of ascertaining who the parties may be that compose any particular firm, partnership or association for trading purposes, by enacting that the partners or persons associated together should sign and file the declaration referred to in the statute, so that all persons dealing with any co-partnership, or desirous of knowing who the partners are, may by a simple search in the registry office see to a certainty the names of the persons composing any such copartnership, and their places of residence. And the intent of the sixth section was to put at rest and beyond all dispute any question as to the persons who are the partners in any such firm or co-partnership, by declaring that the statements contained in the declaration should be incontrovertible as against the person who signed the same ; and in order to compel the filing of such a declaration the legislature, by the fourth section, enacted that every member of such partnership failing to comply with the requirements of the act should forfeit the sum of \$200.

It is true that the sixth section is general in its terms, and that it does not point out in what cases or under what circumstances the contents of the declaration shall not be

disputed ; but we take it, when we look at the preamble of the Act and the whole tenor of the Act, it is apparent that that section has reference to any liability or action against the firm or co-partnership, and as against creditors of the partnership or any one having any claim against the partners as such.

During the argument a number of cases on both sides were cited as to the effect of the preamble upon the enacting clauses, but, without referring to these authorities, our Interpretation Act, Statute of Ontario, 31 Vic., ch. 1, sec. 7, subsec. 39, enacts that the preamble of every Act "shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act." The preamble of this Act shews that its object was to remove the difficulties that existed in bringing actions against persons associated as partners, viz., in ascertaining the names of the partners and their places of residence, &c., and the declaration required to be filed is to furnish that information ; and the sixth section was passed to avoid the possibility of any such difficulty, by preventing any person signing any such declaration from denying, in any action against the co-partnership, that the persons therein named were partners.

This is not an action brought against any firm or co-partnership. It is not one brought to recover any debt claim, or liability against persons associating for trading purposes. It is a penal action to recover a penalty ; and in order to recover it was necessary first to establish that a partnership did exist, and that the defendant was a member of it and failed to comply with the requirements of the 33 Vic., and for that purpose the plaintiff called witnesses to prove that the defendant and his brother were partners in business for some years previous, and that they never knew of any change being made. On the other hand, the alleged co-partner of the defendant was called, who testified that the partnership with the defendant was formed on and existed from the 1st of July, 1870. If that be true, then the plaintiff failed, as the declaration was filed a few days after.

If this plaintiff were suing as a creditor of the co-partnership, I could understand his invoking the sixth section of the statute, but he is not; he is suing the defendant in his individual capacity, and not for any debt or liability of the partnership. In our opinion the sixth section can only be invoked when an action is brought against the members of a partnership, or in a cause where the partnership is concerned, and in any such case it is not competent for any member of the firm to dispute the allegations made in the declaration filed in pursuance of the statute and signed by him.

There was therefore no misdirection, and this rule must be discharged.

Rule discharged.

CUNNINGHAM V. THE GRAND TRUNK RAILWAY COMPANY
OF CANADA.

Master and servant—Negligence of servant—Liability of master.

The plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains, and was thus taking two crow bars from Port Hope to a point on the line where his men were at work. As the train passed the spot C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggage man having nothing to do with him nor any right to meddle with his tools, nor did he ask him to put the bar out.

Held, that defendants were not responsible for the injury, for the baggage man was not acting as their servant or in pursuance of his employment.

THE declaration set out that the defendants by their servants so negligently and unskilfully removed a certain crow bar from a train of the defendants, that the plaintiff, who was then lawfully upon the lands of the defendants and near to the said train, was struck by the crow bar, whereby the plaintiff was knocked down and wounded.

Plea: Not guilty, by Consol. Stat. C. ch. 66, sec. 83.

It appeared at the trial, at Cobourg, before Galt, J., that the plaintiff was in the employment of one Church, a contractor with the defendants for building fences by the rod along the line of the defendants' railway: that on the 11th of September last Church was on the train, and had the crow bar in question and another, which he was taking from Port Hope to a point on the line a few miles distant, for the use of his men working on the line, and that he, Church, put them in the baggage car, intending to drop them out of the car as the train passed where his men were working. At this point the plaintiff was working on the fences, and was standing at the time about twelve feet from the track. As the train passed, Church dropped one of the bars off; and a person in the baggage car, whom the plaintiff called a baggage master, pitched the other bar out, and it struck the plaintiff, and injured him severely.

Church, who was called by the plaintiff, stated that the bars belonged to him: that he put them in the baggage car, that he himself had charge of them, and that it was his business to take them off; that the baggage man had nothing to do with him, nor had any employee of the defendants any right to meddle with his tools, and as a matter of convenience to him the defendants allowed his tools to be so carried: that he did not ask permission to place the bars where he did, nor ask the person who threw the one that struck the plaintiff to put it out; and Church could not say that the person who pitched it out was a baggage master, although he knew all the baggage masters on the line.

Upon this evidence the defendants' counsel submitted that the plaintiff had not made out a case, there being no evidence that the person who threw the bar was engaged in any duty for the defendants at the time it was thrown, or if he was it was not shewn that it was any part of his duty to do what he did. He further submitted that it appeared that Church, the baggage master, and the plaintiff were in one common employment under the defendants, in connection with the railway.

The learned Judge being of opinion that there was no case to go to the jury, nonsuited the plaintiff, the plaintiff's counsel objecting.

In Michaelmas Term last *Armour*, Q. C., obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence to go to the jury to charge the defendants: that the employment of the plaintiff was not such a common employment with the baggage master as to disentitle the plaintiff to recover; and that the defendants were, under the facts proved, liable for the act of the baggage master.

Bell, Q. C., (of Belleville) shewed cause. What the baggage man, if it was the baggage man at all, did in this case was not done in the discharge of any duty incumbent upon him, or in the course of his employment, and the defendants therefore cannot be responsible: *Murray v. Currie*, L. R. 6 C. P. 24; *Murphy v. Caralli*, 3 H. & C. 462; *Storey v. Ashton*, 10 B. & S. 337, 339. As to the liability of railway companies for acts of their agent, he referred to *Allen v. London and South Western R. W. Co.*, L. R. 6 Q. B. 65; S. C. 23 L. T. Rep. N. S. 612; *Tebbutt v. Bristol and Exeter R. W. Co.*, L. R. 6 Q. B. 73; S. C. 23 L. T. Rep. N. S. 772; *Poulton v. London and South Western R. W. Co.*, L. R. 2 Q. B. 534; *Edwards v. London and North Western R. W. Co.*, L. R. 5 C. P. 450; *Williams v. Jones*, 3 H. & C. 602, S. C. 13 L. T. Rep. N. S. 300.

Armour, Q. C., contra. The defendants cannot claim exemption here on the ground of a common employment between the baggage man and the plaintiff. That rests upon the principle that a person entering upon an employment takes the ordinary risks attending it, among which is the negligence of his fellow servants; but here there was no contract between the plaintiff and defendants. Church, not the defendants, employed and paid him, and the baggage man was employed by defendants. As to exemption upon this ground, see *Priestley v. Fowler*, 2 M. & W. 1; *Hutchinson v. York, &c., R. W. Co.*, 5 Ex. 343; *Wigmore v. Jay*, 5 Ex. 354; *Degg v. Midland R. W. Co.*,

1 H. & N. 773; *Vose v. Lancashire and Yorkshire R. W. Co.*, 2 H. & N. 728; *Waller v. South Eastern R. W. Co.*, 2 H. C. 102; *Hall v. Johnson*, 3 H. & C. 589; *Morgan v. Vale of Neath R. W. Co.*, L. R. 1 Q. B. 149; *Tunney v. Midland R. W. Co.*, L. R. 1 C. P. 291; *Feltham v. England*, L. R. 2 Q. B. 33; *Lovegrove v. London, Brighton, &c. R. W. Co.*, 16 C. B. N. S. 669; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Bartonshill Coal Co. v. McGuire*, Ib. 300; *Plant v. Grand Trunk R. W. Co.*, 27 U. C. R. 78; but these decisions cannot apply here, the principle upon which they rest being as already stated. The baggage man here was acting in the course of of his employment, which is the question, not whether he was acting in the discharge of his duty. If that were the test the employer could never be liable, for the servant would never have authority to be negligent. In *Williams v. Jones*, 3 H. & C. 602, smoking a pipe, which caused the accident, was most certainly no part of the workman's employment, and yet two of the Judges thought the employer liable. Here the taking the bars out was done in acting for the defendants, and in the discharge of a baggage-man's ordinary duty: *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Scott v. Mayor, &c., of Manchester*, 1 H. & N. 59; *Regina v. Stephens*, L. R. 1 Q. B. 702; *Smith on Master and Servant*, 3d ed., 260; *Redfield on Railways*, 4th ed., vol. i., p. 507.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that upon the evidence before the learned Judge the conclusion he arrived at was a correct one.

The plaintiff was in the employment of Church, a contractor under the defendants. Church was permitted by the defendants, as a matter of convenience to him, to carry the tools used by his workmen on the defendants' trains, so as to enable him to drop them on the line of railway where his workmen might be employed. According to Church's testimony it was his duty to place the bars in question on the train, to take charge of them while there,

and his business to put them off where he wanted them, and the person (assuming him to be a baggage master, which is anything but clear) who threw the bar off had nothing to do with him, Church, nor any right to meddle with his tools, nor did he ask him to put them out, or his permission to place them in the car.

Under such circumstances, it appears to us that these defendants are no more responsible to this plaintiff than if any stranger on the car did the act complained of. The only inference to be drawn from the act of the person who threw the bar off is that he was acting for Church, gratuitously assisting him in putting out his tools, and not in pursuance of his employment as a servant of the defendants.

To make the defendants liable it can only be on the ground that the person who pitched out the bar was doing the act as a servant of the Company, and in pursuance of his duty and employment. The evidence of Church, we think, negatives that view of the case, and establishes that the injury was not the result of an act done in pursuance of the defendants' orders, or by their servant as such.

The latest case bearing on this question of negligence is that of *Murray v. Currie*, L. R. 6 C. P. 24. Willes, J., in giving judgment says, "I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer, and has control over the work. You cannot go further back, and make the employer of that person liable. The question is whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the ship owner's. * * * The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of his master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service."

Now in this case, assuming that it was a servant of the

defendants who pitched off the bar, it does not appear from the evidence to have been an act done in pursuance of his duty or employment. The evidence rather shews that in the act done he was acting as a volunteer, and assisting Church in putting off his tools for the use of his workmen, and he was in effect, although unasked, employed at the time doing Church's work. And supposing that we might infer from the evidence that the defendants lent the services of their baggage-master to Church to help him in putting off his tools, he, Church, having, as he swore, the sole superintendence of them, and as to when and where they were to be put off, still it seems to us in that case the act would be within the principle laid down by Brett, J., in *Murray v. Currie*, in which he says, "But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."

On the whole case, it appears to us that the defendants incurred no liability by the act complained of, and that this rule should be discharged.

Rule discharged.

IN RE MCBRIDE AND THE CORPORATION OF THE TOWNSHIP OF YORK.

Road between townships—Dedication—Power to close.

A road had for more than fifty years been used as the road between the townships of York and Vaughan, the original road allowance being to the north of it, and this road being in fact wholly within the township of York and part of lot 25. The owner of the lot had been indicted for closing up this road and convicted in 1870; and the corporation of York then passed a by-law to close it, reciting that there was no further necessity for it by reason of the road allowance.

Held, there being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, that this was a road dividing different townships, over which the County Council only had jurisdiction; and that the by-law therefore was illegal.

Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication.

Quære, whether any one can add to a public allowance for road by dedication, so as to compel the local authorities to repair it,

IN Michaelmas Term last *Harrison*, Q. C., obtained a rule calling upon the council of the corporation of the township of York to shew cause why by-law numbered 362 should not be quashed, with costs, for illegality, on the ground that the council had no power to pass the same, and on grounds disclosed in affidavits and papers filed.

The by-law was passed on the 7th November, 1870. It recited that there was a road or highway created by dedication by the owner of lot 25 in the 2nd concession of York, or otherwise, as evidenced by public use, until it was stopped up about seven years ago by one Thomas Jackson, the then owner of the lot, the public using the same under the belief that they were using the original road allowance between the townships of York and Vaughan; and that, by reason of the road allowance between the said townships, there was no further necessity for the said road over the north part of lot 25.

Then it declared that from and after the passing of the by-law all the road south of and including the northern boundary line of lot 25 in the 2nd concession of York—and which northern boundary of said lot might be better known by a line drawn from a stone monument planted in front of the said concession, to a stone monument planted in rear of the concession by Charles Unwin, a Deputy Provincial Surveyor, to define the limits of the concession, under the authority of the council—be, and the same should be thereby closed and stopped up, and should cease to be a road or public highway.

The copy of an indictment was put in against Thomas Jackson, for putting a fence upon a certain street called the town line between the townships of York and Vaughan, being the Queen's common highway, upon which he was tried at the General Sessions of the Peace for the county, and convicted, in July, 1870, and was ordered to remove the obstruction within two months, and to pay a fine of \$1 and costs.

It was then sworn that Jackson had not removed the obstruction, and that the road referred to in the by-law

was the town line between Vaughan and York, and had been so used for more than fifty years as the proper travelled road between the two townships.

In this Term *M. C. Cameron*, Q. C., shewed cause. He filed an affidavit of Thomas Jackson, to the effect that a full original allowance for road lies between the townships north of his land, and no portion of the land described in the by-law lies out of the Township of York: that the jury on the trial of the indictment found that no part of the original allowance for road had been closed, but that there had been a trespass road on the north part of Jackson's lot, and he was found guilty because he had stopped that road; and that the Council of York had enacted that the defendant should hold the land freed from the said easement, since which he had again put up a fence on the northern limit of his lot, having removed it before that time, after the verdict was found against him.

He contended, then, that it appeared the piece of land in controversy was in fact a part of lot 25, in the township of York, and although it had been used as a road, it was not a road between the townships, and could not be while part of and lying wholly within the one township: Municipal Act of 1866, secs. 333, 341.

Harrison, Q. C., supported the rule. The land in question may be in fact part of lot 25 in York, but there is nevertheless a road over it, and that road is correctly described as lying between the townships of York and Vaughan: Municipal Act of 1866, secs. 317, 341, 344, sub-sec. 3.

WILSON, J., delivered the judgment of the Court.

It is not disputed that townships may open and close roads situate within their limits, nor that a township cannot close up or alter a road which divides different townships, even although the road "may so deviate as in some places to lie, wholly or in part, within one township;" nor that the County Council in which the townships are

situate can alone do so. The Municipal Act is very precise and plain on these points.

Nor are the facts here in dispute. It is admitted that there was and still is the full original allowance for a road between these townships, but that for some reason a part of it has not been opened opposite to the lot number 25, and that a part of the northerly end of that lot has been used as a public road for a very great many years, from which a dedication might well be presumed, either in place of that part of the original allowance which has not been opened on the north or Vaughan side, or as supplemental to it.

The only question is, whether the portion of lot 25 in York can be considered as any part of a road dividing townships, or between townships, when the full and true road allowance is there independently of it.

No doubt the owner of lot 25 in York could dedicate a part of his land adjoining the actual allowance for road as and for a part of it, or for the public use generally. And if it were used by the public that would, *primâ facie* at any rate, constitute it a highway.

Whether any one can add to a public allowance for road by dedication, so as to make it obligatory upon the local authorities to repair it against their consent, may be a question. See *Rex v. Inhabitants of Leake*, 5 B. & Ad. 469; *Regina v. Inhabitants of Lordsmere*, 15 Q. B. 689.

It might depend upon the fact whether it was beneficial or necessary for the public, as well as on the fact of common user.

It would seem unreasonable that any one should impose a burden on the municipality to repair roads which he opened at his pleasure merely because the public used them. If he can do that, the municipalities can protect themselves by passing a by-law for closing or contracting the road or land dedicated.

There is quite sufficient evidence before us on this application of the fact of acceptance of the land, if acceptance be necessary to constitute it a highway, as well as of dedi-

cation. The common user for more than fifty years, and the conviction of the proprietor of lot number 25, in the year 1870, are sufficient for the purpose.

That dedication, in the absence of any contrary intention, must be presumed to have been a dedication of the road as a public highway, or as part of the public highway between these townships.

If so, both townships became interested in it as of common advantage to them both, in which case the policy of the law is to give to neither of them the absolute control over it.

It became a road, or part of a road, between or dividing townships, which could not be closed up or altered but by the authority of the county council.

It is not necessary that the road between townships should consist of original road allowance only. Such roads may be acquired or may be added to by purchase or by dedication, as in other cases, and when once established by any lawful means it is a road for all purposes, and subject to the common incidents and law applicable to highways in the particular locality in which they are situated.

This highway being between townships became subject to the incidents and law which govern highways between townships, and one of the incidents and part of the law relating to such a highway is, that it cannot be closed but by the authority of the county council. That authority has not been exercised. The parcel of land in question is therefore still in law a part of the highway or public road between the townships of Vaughan and York, as it has heretofore been. The township council of York had no power to close it. The by-law which was passed for that purpose is not valid, and must be quashed with costs.

Rule absolute.

PATTERSON AND THE CORPORATION OF THE TOWNSHIP OF
HOPE.

Alteration of school sections—Application to quash by-law—Repeal.

While an application to quash a by-law, No 250, altering the boundaries of school sections 15 and 16, was pending, the corporation passed a by-law, No. 268, to remove doubts in regard to the former by-law and to confirm it, but so worded as to leave it doubtful whether it was not in effect an independent by-law, defining the limits of these sections. The first by-law was quashed, and an application was then made to quash this last by-law. It appeared, on shewing cause, that it had been repealed.

The Court, under the circumstances, quashed the by-law, notwithstanding its repeal; for the repealing by-law being, in effect, a by-law making an alteration in school sections, it could not take effect until the 25th of December following, and it was stated that the trustees of section 15 intended to act under this by-law to be repealed.

T. M. Benson obtained a rule calling on the corporation to shew cause why by-law No. 268 of the council, entitled "By-law No. 268, to explain, confirm, or amend by-law 250," should not be quashed, on the ground that the said by-law 268 confirms, or attempts to confirm, a by-law which was illegal, and which had been quashed by this Court, and that the corporation had no power to pass such by-law.

It appeared from the papers and affidavits filed on making the application, that by-law No. 250, which altered the boundaries of school sections 15 and 16, in the township of Hope, was, on the 27th December, 1870, by a rule of this Court, set aside with costs (*a*): that on the 26th December, 1870, while the rule was pending to quash that by-law, No. 250, the township council passed the by-law 268, now in question, to remove all doubts and ambiguity in regard to by-law 250, and also to confirm the said by-law; and the by-law set out in the enacting part what lands should be awarded to school section 15, and of what lots section 16 should consist: that the school trustees of section No. 15 intended to levy from the inhabitants of that portion of section 16 detached from it and added to section 15 under by-laws 250 and 268 the school rates for the present year, and that they took the necessary steps to have trustees elected in pursuance of the by-law

(a) See *Patterson and the Corporation of Hope*, 30 U. C. R. 484.

268; and that it was apprehended that the trustees of school section 15, as set out in the by-law, would for the present year enforce the rate from the inhabitants of that part of section 16 added to section 15 by by-laws 250 and 268. It appeared, also, that after the passage of by-law 263 the same, and the alterations of the school sections in pursuance thereof, were duly notified to the school trustees in accordance with the provisions of the school act.

Armour, Q. C., shewed cause, and filed the affidavit of the reeve of the township, which set out that at the first meeting of the council for this year the trustees of section 16 applied to the council to repeal by-law No. 268, as it was doubtful whether, notwithstanding the quashing of by-law 250, No. 268 was not still in force: that the corporation took the advice of counsel, and the reeve was advised that the quashing of by-law 250 in effect quashed by-law 268; but, in order to remove any doubt, a by-law was passed repealing by-law 268. A copy of the repealing by-law was filed, passed on the 4th of February, 1871.

Benson supported the rule.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that we must make this rule absolute.

The corporation, during the pendency of an application to this Court to quash a by-law of theirs, No. 250, passed this by-law now in question, by it professing to remove doubts, &c., in regard to No. 250, and to confirm it. On examining the enacting clause of No. 268 we find it to be substantially a new by-law, defining the limits of school sections 15 and 16, and repealing all other by-laws inconsistent with it. This by-law was passed on the 20th of December, 1870, and on the same day due notification of its contents was sent by the township clerk to the trustees, so that they might be governed accordingly, and that the by-law, under the provisions of the Common School Act, took effect on the 25th December, 1870. On the 27th December a rule issued from this Court quashing by-law No. 250.

On the argument it was pressed on us that there was no necessity for this application, as by-law 268 could have no effect, as it fell with by-law No. 250 when the latter was set aside, and further, that the corporation had also repealed it. We do not think it necessary for us to determine whether this by-law necessarily fell with by-law 250. We think it sufficient to say, for the purpose of this application, it is not clear that by-law 268, although professing to remove doubts and confirm No. 250, is not substantially an independent by-law irrespective of by-law 250. The corporation, however, felt it expedient, at the instance of the trustees of school section 16, whose limits were altered by the provisions of by-law 268, to pass a by-law repealing it on the 4th February last, and so far as lay in their power remedied the difficulty. But under the provisions of the school acts any alteration of a school section cannot take effect until the 25th December next after the passing of the by-law, and, assuming by-law 268 to be a good by-law, unless set aside, it took effect on the 25th December, 1870, and by it the school sections were then changed. Then comes the by-law passed on the 4th February, 1871, repealing by-law 268. Now, the effect of that by-law was an alteration in those school sections, and, consequently it could not go operation until 25th December, 1871.

In *Shaw et al. v. The Corporation of Manvers*, 19 U. C. R. 288, Burns, J., in delivering the judgment says: "The giving of notice, &c., must apply as well to the repeal, which would of itself constitute an alteration, as of a notice in the first case of making a change."

As it is sworn that the trustees of section 15 in the mean time intend acting under the provisions of by-law 268, to set at rest any doubts as to its validity, and avoid further difficulty among the inhabitants of these school sections, the rule will be made absolute with costs.

Rule absolute.

MALOTT V. CARSCADDEN.

Deed—Attempt to vary by parol—Pleading.

Declaration, that defendant leased certain land from the plaintiff for a year, and covenanted to purchase it within the term, or to pay the interest for a year on a mortgage given by the plaintiff on the land, but did neither.

Plea, that it was agreed by the same deed, that if the plaintiff should during the term sell the land to another defendant should not pay the interest, and that the plaintiff sold and defendant gave up possession to the purchaser. Replication, that before the term expired defendant notified the plaintiff that he would not purchase, and requested him to sell, and that the plaintiff in consequence sold, but subject to the defendant's term, which is the sale alleged in the plea.

Held, after verdict for the plaintiff, that the replication was bad, as attempting to vary the deed by a parol agreement; and a verdict was entered for defendant.

This was a County Court case tried at the Fall Assizes for 1870, at Sandwich, before Wilson, J., without a jury.

The first count set out that defendant leased certain lands from the plaintiff for a year, and covenanted to purchase the premises within the term, or, in case he did not, he would pay the plaintiff the interest for one year which would be due on a mortgage for \$1200, given by the plaintiff on said lot. Breach, that defendant did not purchase, nor did he pay the interest. Second count, for one year's rent. Third, common counts.

Pleas : 1. To first count, *non est factum*.

2. To same count, that it was agreed between plaintiff and defendant by said deed, that if the plaintiff should sell the land to another person within the term, the plaintiff should pay the interest on the mortgage and exonerate defendant from payment of the same; and that the plaintiff sold during the term to one Maynard, and defendant gave up possession to the purchaser, who accepted the same.

3. To same count, never indebted.

4. To same count, that defendant surrendered the land to the plaintiff before the rent became due.

6 and 7. Pleas to common counts, never indebted.

The plaintiff took issue on the pleas, and replied to the second plea, that before the expiration of the term, &c ,

the defendant gave notice to the plaintiff that he would not purchase the said land, &c., and that he desired and requested that the plaintiff would sell the said land to any other person, &c. : that the plaintiff afterwards, by reason, &c., sold the land as in the second plea alleged, but subject to the defendant's said term thereof, which is the sale in the plea. Issue thereon.

On the trial the agreement between the parties was proved, as follows : "This indenture, made the 19th April, 1869, &c., witnesseth that the party of the first part (the plaintiff) doth lease unto the party of the second part (the defendant) for one year from the date hereof, (setting out the premises) reserving the fall wheat sown on said lot, on paying the interest of a certain mortgage thereon amounting to \$1200. If defendant fails in purchasing the land within one year from the date hereof, and defendant binds himself to purchase the said land within the said term of one year, or in default thereof to pay the said interest of said mortgage, &c., for one year. And in case the plaintiff sells said land within one year to any other save defendant, then the plaintiff pays the said interest on said mortgage." This instrument was signed and sealed by both parties.

It appeared from the plaintiff's testimony that he had obtained a loan for \$1200, for which he gave a mortgage on the premises in question at ten per cent. : that the defendant went into possession, and remained in the place until the 14th April, 1870 : that previous to the defendant leaving the premises the plaintiff had sold the land to one Maynard : that in August or September, 1869, the defendant notified the plaintiff that he would not buy the plaintiff's lot, being unable to sell his own lot, and that he, plaintiff, might sell the lot to any one if he had a chance to do so : that after the plaintiff sold to Maynard the plaintiff asked defendant to allow Maynard to repair the fences, &c., and that defendant said he would give up possession of the house and place, which he did, to Maynard.

At the trial the learned judge was of opinion that the plaintiff succeeded on the first plea and defendant on the

other pleas; and that the plaintiff also succeeded on the special replication to the second plea, as pleaded, which replication he thought bad and ought to have been demurred to, but as issue had been taken on it he entered a general verdict for the plaintiff, and assessed the damages at \$120.

In Michaelmas Term, 1870, *Holmested*, for defendant, obtained a rule to set aside the verdict as being contrary to law and evidence, and to enter a verdict for defendant on all the pleas but the first, and to arrest judgment on the plaintiff's replication to the second plea, on the ground that the issue raised by the replication is immaterial and affords no answer in law to the second plea.

A cross rule was obtained by *Osler* to enter the verdict for the plaintiff on all the pleas but the first, on the ground that the learned judge should have found in favor of the plaintiff on the issues raised on these pleas. Both rules were argued together during the same term.

O'Connor, for the plaintiff, cited *Shep. Touch.* 88; *Chitty Con.* 89; *Parsons on Contracts*, Vol. II. p. 26.

Holmested, for the defendant, cited *Hall v. Burgess*, 5 B. & C. 332; *Collett v. Curling*, 10 Q. B. 785; *Dodd v. Acklom*, 6 M. & G. 672; *Walls v. Atcheson*, 3 Bing. 462.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that on both rules the defendant is entitled to our judgment.

It is quite clear, upon an examination of the evidence given on the trial, that the finding of my brother Wilson on the whole case was correct, and my learned brother having found the issue raised by the special replication to the second plea to the first count in favor of the plaintiff, the question arises whether that replication is good in point of law.

Now the plea sets out that it was provided in this deed, upon which the plaintiff sues in the first count, that should the plaintiff sell the demised premises during the term to any other person than the defendant, in such case he, the

plaintiff, would pay the interest on the mortgage, and exonerate, &c., the defendant from the payment of the same, and the plea avers a sale during the term to one Maynard, and that the defendant, at the request of the plaintiff, surrendered the term and gave up possession to Maynard, who accepted the same. To this the plaintiff replies, that before the expiration of the term, &c., the defendant notified the plaintiff that he would not purchase the land as he, defendant, had agreed, and requested the plaintiff to sell the land to any other person, or that the defendant should be relieved from his covenant to purchase, and that the plaintiff, in consequence thereof, sold the land as in the second plea alleged, subject to the defendant's term.

It is a well established rule of law that the terms of a contract under seal cannot be varied by any subsequent parol arrangement. Taking the first count and the plea together, it is shewn that no breach of covenant was committed and no cause of action had accrued to the plaintiff, but the plaintiff attempts to displace the defence set up by the plea by shewing that the sale by the plaintiff during the term took place at the request and with the consent of the defendant, in effect setting up a parol agreement varying or waiving the special proviso upon which the defendant's liability and covenant depended, converting the defendant's conditional covenant into an unconditional one, or, in other words, superadding a new stipulation to the original condition exonerating the defendant, *i. e.*, excepting a sale to another made at the request of the defendant during the term. The replication is therefore clearly bad and no answer to the defendant's plea, and the defendant's rule must be made absolute and the cross rule discharged.

Rules accordingly.

THOMPSON ET AL. V. MICHAEL HALL AND JOHN HALL.

Judgment in ejectment—Effect of, in evidence—Proof of title—Notice under C. S. U. C. ch. 27, sec. 17.

In ejectment the plaintiffs claimed under a deed from E., M., and T. The defendants shewed no title. It appeared that E., on the 26th June, 1856, recovered judgment in ejectment for the land against defendant, in an action commenced on the 3rd September, 1855, and the *Hab. Fac.* was returned executed on the 21st July, 1856, possession having been delivered to the plaintiff's agent, who held it for two or three years. It also appeared that on the 17th March, 1858, the defendant brought ejectment against E. and the other two plaintiffs herein, and was nonsuited. How he afterwards obtained possession did not appear.

Numerous objections were taken to the plaintiffs' proof of title prior to September, 1855:—to the evidence of identity—to the custody from which ancient deeds were produced—to the want of proof of the deaths of trustees recited in the deeds appointing others in their place, to the proof and effect of proceedings in Chancery with respect to certain lunacies—and that a term of 1,000 years created by will in 1806 was still outstanding.

Held, that the defendant could not dispute the plaintiffs' title further back than the 3rd September, 1855, the judgment in ejectment being evidence of their title at that time as against this defendant, who shewed no title in himself.

Held, also, that, under the circumstances, the plaintiffs by serving a notice under C. S. U. C. ch. 27, sec. 17, might have compelled the defendant to shew title.

EJECTMENT for the west half of lot 18 in the sixth concession of the township of Woodhouse.

The plaintiffs claimed by deed from George Robertson Edwards, James Montgomery, and Edward Thompson to the plaintiffs.

The defendants defended for the whole, and denied the plaintiffs' title. Michael Hall also claimed title in himself by length of possession, and John Hall claimed under him.

The cause was tried in the fall of 1870, at Simcoe, before Morrison, J., without a jury, when a verdict was entered for defendants.

The plaintiffs put in, 1. Patent, 20th November, 1790, to Louvigny Montigny.

2. Deed, dated 13th October, 1804, from the patentee to William Robertson, of Queenston, Merchant.

3. Deeds of lease and release, dated 5th and 6th April, 1820, from Elizabeth Lucy Robertson, only child, heiress-at-law,

and general devisee of William Robertson, to Peter Lawrie, Rev. Thomas Edwards, James Montgomery, and Thomas B. Rowe, as trustees for the purposes of the marriage of Elizabeth Lucy Robertson to Henry Ronalds.

4. Deed of 1st October, 1823, endorsed on the deed of 13th October, 1804, by which William Robertson, of, &c., conveyed the lands to the same trustees who were named in the deeds of 5th and 6th April, 1820, and referred to that deed.

5. Deeds, dated 1st and 2nd April, 1840, by which Henry Ronalds and his wife Elizabeth Lucy appointed Thomas Edwards, Thomas B. Rowe, Charles Field, and John Ronalds, trustees of the settlement, the two last named persons being appointed in place of Peter Lawrie, who had died, and of James Montgomery, who had become of unsound mind.

6. Deed, dated 24th February, 1842, by which the then four acting trustees, Thomas Edwards, Thomas B. Rowe, Charles Field, and John Ronalds, with the assent of Ronalds and his wife, appointed George Robertson Edwards as trustee in the place of Thomas Edwards, who resigned.

7. Deed, dated 11th October, 1855, made by Elizabeth Lucy Ronalds, widow, a person of unsound mind, by James Montgomery her committee, of the first part, the Rev. George Robertson Edwards, of the second part, James Montgomery and Edward Thompson, of the third part, and Henry Edwards Brown, of the fourth part. It recited the death of Henry Ronalds: that under a commission of lunacy Elizabeth Lucy Ronalds was found to be of unsound mind, and James Montgomery was afterwards duly appointed by the Lord Chancellor the committee of her estate. It also recited the death of John Ronalds and of Thomas B. Rowe and Charles Field, leaving George Robertson Edwards the sole surviving trustee, and that by sundry proceedings in Chancery James Montgomery was empowered to act in the matter of the trust on behalf of Elizabeth Lucy Ronalds. And by it James Montgomery appointed himself to be trustee of the settlement.

Deed, dated 28th July, 1865, appointing the three plaintiffs,

James Montgomery, David Atcheson, and Edward Thompson, new trustees.

Edward Harris, said: My brother and partner is agent for the Ronalds estate. Mr. McLean, of Chatham, was the former agent. On his death the patent, the deed of 1804, and the deed of 1823, which is endorsed on it, came to us. My brother acts under a written power. Prior to the power we were acting under a written authority, but McLean was the active agent. I knew it from conversations with McLean, and seeing his letters with the trustees and the other parties, and from relatives of my brother's wife, who is interested in the estate. McLean signed leases for the estate. I have some of them here. The lease for the other half of this lot I produce. McLean died about two years ago.

An exemplification of judgment in ejectment was put in, entered 26th June, 1856; George Robertson Edwards, surviving trustee, &c., plaintiff, against defendant Michael Hall and one Catharine Hall. Writ of summons in that suit, dated 3rd September, 1855. *Habere Facias*, dated 26th June, 1856; returned executed 21st July, 1856.

Henry V. Rapelje said: I was sheriff of Norfolk in 1856. I executed the writ of possession produced. I gave possession to James Walker as agent of the plaintiff. I ejected the two Halls, and gave possession. I turned Michael off. Full possession was given. I think Walker was agent for several years.

The record was put in of suit Michael Hall, plaintiff, against George Robertson Edwards, James Montgomery, and Edward Thompson, trustees, &c. Date of writ, 17th March, 1858. The plaintiff in that action was nonsuited. This evidence was objected to.

David Tisdale, said: Mr. McLean, of Chatham, was, from about 1860, the agent of the trustees of the Ronalds estate, and of this lot in particular. From 1857 to 1860 Henry Ronalds was acting as agent, and James Walker acted under him as agent in this County, and also under

McLean until I was appointed. Both Ronalds and McLean visited the lands once a year and inspected them. I went several years with McLean to visit all the lands. I defended the suit, of which the record has been put in, under Ronalds' instructions. I also applied to Walker for instructions.

Harry Becher: I look at deed of 11th October, 1855. I saw James Montgomery for himself, as well as a committee, acknowledge and re-deliver the deed on the 27th July last, in the City of London, England. I saw the Rev. George Robertson Edwards also acknowledge and re-deliver that deed on the 28th July, at Shrewsbury, Shropshire, England. I also saw Edward Thompson do the same on the 30th July, at the City of London, England. I also know the handwriting of all the parties, and can swear to the genuineness of the signatures. I also know the signature of the witness, Brown, to the deed. He lives in London, England.

I look at deed of 28th July, 1865. I saw the same parties acknowledge and re-deliver it at the same places and on the same days. I also know that the signatures of the witnesses thereto are genuine. I do not know the name of Henry Thomas Sale. All the deeds now shewn to me I received from Messrs. Thompson & Debenham, solicitors. Thompson being one of the trustees. Three weeks before the 27th July, 1870, I first knew Thompson's signature; did not know the signatures of the other parties previous to the 27th July. I first met Thompson on the 24th June, I met Edwards, Montgomery, and Brown, only once: the others frequently. Before meeting them I had no knowledge of the writing of any of them. I asked each of them to shew me writing and signatures which they had written previously, and I compared their signatures with these writings. I also got them to write their signatures in my presence several times, and I have no doubt that the signatures to the deeds produced were written by the several parties, both from what I saw and from comparison with their signatures written in my presence.

Henry Sharp : I live on the east half of the lot, under a lease from Mr. Walker as agent of the Ronalds estate. I have been on the east half 18 or 20 years. I remember the suit against Hall and his mother. Hall was put off, and one Jamieson was put in by Walker, in 1856. He was a year or more in possession.

Solomon Walker : Repeated some of these facts. He also said : My brother was agent for the estate for 10 or 12 years. He was agent in 1856, and before he was agent one Askin was agent, when I was a boy, 50 years ago.

At the close of the plaintiffs' case the counsel for the defendants took many objections.

For the defence : *Christopher Yeomans*, said : Michael Hall, the defendant, went on the land in the fall of 1843 or 1844, or rather his father Michael went on it. One Yeomans was on it before that. He went on in the spring of 1837. He underbrushed part in 1837 and 1838, and made sugar on it. He put a house up on the lot and went on to the lot to live in 1839. In 1843 Hall bought Yeomans out. Michael, the father of the defendant Michael, died on the land about 20 years ago. Defendant remained on after his father's death. He did not clear on the west half at first ; he cleared on the east half ; can't say on which half he cleared, think it was on the west ; how much can't say. He cleared eight or ten acres on the west half ; it is now nearly all cleared. Who owned the land was not known then. Yeomans would not take a lease from Walker.

Edward Secord spoke to the same effect as the previous witness.

It was then agreed that a verdict should be entered for defendants, reserving leave to the plaintiffs to move to enter a verdict for them, if on the whole case and evidence the Court should be of opinion a verdict should have been entered for the plaintiffs ; the Court to be at liberty to draw inferences of fact as a jury might, or as a Judge might who tried without a jury.

In Michaelmas Term thereafter, *Osler* obtained a rule

calling on the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs on the leave reserved.

In this Term *C. S. Patterson* shewed cause. He contended that as to the deeds more than thirty years old they were not admissible, because not shewn to have come from the proper custody, that is, the deeds of 5th and 6th April, 1820, and of 1st April, 1840. The patent and the deed to William Robertson of 13th October, 1804, were not objected to. The deeds objected to were got from Mr. Thompson in England, but he, though a trustee, was not shewn ever to have been in possession of the land. The deed of 1820 recites that Elizabeth Lucy Robertson is the heiress-at-law, &c., of William Robertson, but that is no proof of the fact. By the will of William Robertson, dated the 2nd of December, 1806, he devised all his lands in Upper and Lower Canada, and in the United States of America, to the two trustees of the will for the term of 1000 years, for the purposes of the will, and it did not appear that that term had ever been determined, or was not still outstanding in them or in their legal representatives. By the deed of the 1st October, 1823, one William Robertson conveyed the lands to the same trustees who took by the deed of 1820. By the deed of 1840 it is recited that the William Robertson who purchased the lands was the father of Mrs. Ronalds, and as he was dead before 1820, the Robertson who made the deed of 1823 must have been a different person. The deed of 1840 recites the death of Peter Lawrie, one of the original trustees, and that James Montgomery, another of them, had become of unsound mind, and that Charles Field and John Ronalds were appointed trustees in their stead, the appointment of Charles Field being confirmed by order of the Lord Chancellor of Great Britain, under the 11 Geo. IV. and 1 Wm. IV. ch. 60, sec. 5. No estate passed by reason of the Lord Chancellor's order, as the lands affected by it were situate in this Province, nor is there any proof of the proceedings in lunacy more than is contained in the recitals. As to the Lord Chancellor's authority in such a case, he referred to

Daniell's Prac. 1763 to 1794; *Re Schofield*, 24 L. T. 322; *Re The Trustee Act*, 1850, and *Groom's Trust Estate*, 11 L. T. N. S. 336.

There was no proof of the execution of the deed of the 24th February, 1842, at all, and the subsequent title depends entirely upon the new trustee George Robertson Edwards. What was done as to proving this deed was that, assuming the deed of 1840 to have been proved as an ancient deed, the handwriting of the parties to the deed of 1842 was compared with the handwriting of the parties to the deed of 1840. There can be no comparison of writing with that contained in a deed admitted in evidence as an ancient deed: *Taylor on Ev.*, 5th ed., secs. 74, 75, 521, 599, 600, 601.

This deed of 11th October, 1855, was not properly proved by the evidence Mr. Becher gave, and if proved the proceedings in Chancery were not proved by their mere recital, nor were any of the other facts in it mentioned so proved, as the deaths of the former trustees and other matters; and the proceedings in Chancery, even if proved, would not be binding, as the lands affected are situate in this Province: The Imperial Trustee Act of 1850, sec. 4; *Lewin on Trusts*, 776, and the authorities before cited. The objections as to proof of the deed of 1855, apply also to the deed of the 28th July, 1865. The surviving trustee, so far as the deeds shew, brought ejectment on the 3rd of September, 1855, against Michael Hall, one of the defendants, for this land, and recovered it, and had a writ of possession executed in his favour. The plaintiffs are not at liberty to use that recovery against the defendants, for it is not shewn the defendants did not get back to the possession rightfully: *Shaver v. Jamieson*, 25 U. C. R. 156.

Moss supported the rule. The plaintiffs contend they need not go any further back than the time of bringing the action of ejectment before mentioned, and that they proved an indisputable title from that time, admitting that there is any force in the argument against the earlier

paper title of the plaintiffs. The ejectment was brought against the present defendant Michael Hall and one Catharine Hall. That proceeding is conclusive against both the present defendants; against Michael because he was one of the persons against whom the recovery was had, and against John Hall because he claims in his notice under Michael. In every case a recovery in ejectment is cogent evidence that the person who fails was not at that time entitled to the fee, and it is conclusive that the one who did recover was at that time entitled to the possession of the land: *Eccles v. Paterson*, 22 U. C. R. 167; *Asher v. Whitlock*, L. R., 1 Q. B. 1. The deed of 11th October, 1855, was sufficiently proved by the evidence of Mr. Becher. George Robertson Edwards was the plaintiff in the ejectment, and he, by his agent one Jamieson, got possession under the writ of possession in 1856. Jamieson held the possession for two or three years afterwards. In 1858 Michael Hall brought an action of ejectment against the trustees, and was defeated in that action. The following cases shew the effect which a judgment in ejectment has on the rights and titles of persons who are parties to it: *Doe dem. Strobe v. Seaton*, 2 C. M. & R. 728; *Doe v. Huddart*, 2 C. M. & R. 316; *Doe v. Harlow*, 12 A. & E. 42, note (d). The paper title was also clearly proved, and was sufficient to entitle the plaintiffs to recover. There was no proof more than the deeds themselves supplied as to the two persons named William Robertson; there is some confusion about them. By the deeds of 1804 and 1823, it rather appears they are the same person, but it is certain they are different persons. There is no proof either of Peter Lawrie's death, but the recital of it contained in the deed of 1840. But the recitals in ancient deeds are accepted as part of the matter of proof, where the deeds in which such recitals are contained are themselves proved. The deed of 1842 was well proved by comparison of the handwriting with that of the ancient deed of 1840. The Lord Chancellor in England has authority to deal with lands in the Colonies;

and as our Court of Chancery here has the same powers as to trusts which the Court of Chancery had in England on the 10th of June, 1857, our Courts must take judicial notice here what powers in such cases were exercisable by the Court of Chancery in England on that day.

WILSON, J., delivered the judgment of the Court.

The proceedings have been stated at length, and the arguments upon them also. Many exceptions have been taken to the deeds produced. There is no moral reason to doubt their genuineness, nor the truth of the facts contained in them, nor that the facts are at all different in any respect from those which the plaintiffs assert, nor that the plaintiffs are substantially the persons in whom the title is vested, and ought to recover the land.

But it is said by the defendants—who have no other title than occupancy, and who were dispossessed by the process of the Court in 1855, and who again failed by action to recover the possession in 1858, but who have since by some means got back into possession—that the plaintiffs have not proved such a title as will stand the test of the most critical and rigid enquiry which a meritorious occupant, or one who had paid full value for the land believing he had thereby acquired a good title, could raise against it.

The question is whether these defendants have the right to dispute that title further back than the time at which the action of ejectment was brought against Michael Hall and Catharine Hall on the 3rd September 1855. We think they have not; and if the plaintiffs had served the defendants with the proper statutory notice calling upon them to shew their title, that the defendants would not have been at liberty to raise any questions such as they have raised even since that time; the issue would have been upon them to prove their title, and not upon the plaintiffs to prove one against them.

The recovery in ejectment is always deemed to be conclusive in the action for mesne profits against all persons

who were parties or privies to the former action, if the former recovery be relied on in pleading when it can be pleaded as an estoppel.

The first case is *Aslin v. Parkin*, 2 Burr. 665; the last is *Pearse v. Coaker*, L. R. 4 Ex. 92.

In *Doe Strobe v. Seaton*, 2 C. M. & R. 728, reported also in 1 Tyr. & G. 19, it was held that in a second action of ejectment the defendants in the second action could prove a verdict in their favor as defendants in the first action against the case of the same claimants in the two actions. Lord Abinger, C. B., said, 1 Tyr. & G. 22. "A judgment in ejectment may be given in evidence in another ejectment, but it is not conclusive * * * as a party may be entitled to possession at one time, but not at another, but it is clearly admissible." Parke, B., said "The rule is, that if the parties are substantially the same the former ejectment may be adduced in evidence. A judgment is in no case conclusive unless pleaded by way of estoppel, but if it be between the same parties it is evidence to go to a jury. Here the former judgment shews, that on the day mentioned in the first demise the lessor of the plaintiff had no title to demise the property in question."

Alderson, B., said: "In the well-known case of *Wright v. Doe dem. Tatham*, 1 A. & E. 3, it was admitted that the former judgment would have been admissible if it had been a judgment in ejectment, and not a judgment under an issue from the Court of Chancery."

And when counsel said: "There are no cases where a judgment in ejectment has been given in evidence in another ejectment, and the text books lay it down that it is not admissible," Alderson, B., said: "On the contrary, it is laid down in *Bull*, N. P. 232 *b*, that a verdict for the defendant in ejectment is receivable in evidence against the lessor of the plaintiff, and the same point is to be found in *Bac. Abr. Evidence F.* vol iii. p. 235 (ed. 1832)."

In *Outram v. Morewood*, 3 East 354, Lord Ellenborough refers to a case in 3 Leon. 194, in which it appears that in an action of trespass the defendant pleaded by way of

estoppel a recovery he had obtained in an action of ejectment against the plaintiff in trespass.

It is quite clear then that the former proceedings in ejectment were admissible, because between the same parties or privies: 12 A. & E. 42, note (*d*), and many other cases to the same effect: *Doe v. Wright*, 10 A. & E. 763.

What then was it evidence of? It was evidence that Michael Hall, the present defendant, and under whom John Hall, the other defendant, now claims, was in possession of the land when that action was brought against him, that he had no right at that time to the possession, and that the plaintiff in that action had then the right of and to possession as against him: *Pearse v. Coaker*, L. R. 4 Ex. 92; *Doe dem. Strode v. Seaton*, 1 Tyr. & G. 19.

The possession then claimed was obtained by a writ of possession against Michael Hall, who was turned off by the sheriff, and the plaintiff by his agent was put in. The plaintiff, by his agent, kept possession for two or three years afterwards. That possession thus obtained and kept must be presumed to be "good against all the world except the person who can shew a good title"—*Asher v. Whitlock*, L. R. 1 Q. B. p. 5, per Cockburn, C. J.—and to continue until its termination was shewn: *Wilkinson v. Kirby*, 15 C. B. 430.

The case of *Clubine v. McMullen*, 11 U. C. R. 250, determined that the recovery in one action of ejectment was not an estoppel in a second action of ejectment. So far we quite agree. It is not there determined that it was not admissible in evidence. Some reliance was placed upon the fact that the first action was under the old law, when John Doe was the nominal plaintiff, and the second action was in the name of the real party after the passing of our Ejectment Act, and so was not between the same parties. If it be meant that such a difference would justify the exclusion of the first recovery from being given in evidence, I should not be disposed to agree with it, for it is the substantial rights which are considered in such a case, and not the formal manner in which they happen to be represented.

The nature of the objections taken by the defendants should not be permitted, under the circumstances by which they have got into possession of the land, after having been ejected from it by force of the same title which is brought against them in this action. It would be unreasonable to allow an unsuccessful litigant to question over again the identity of the William Robertson whose death is recited in the deed of 1820 with the William Robertson who is a party to the deed of 1823, that is, whether they are the same person as or a different person from the one who executed the deed of 1804—the custody from which these deeds come—the deaths of the different trustees which are recited—the proceedings in Chancery with respect to the lunacies of James Montgomery and Elizabeth Lucy Ronalds—whether the term of 1,000 years, created by the testator in 1806, is still outstanding or not; and the other important and nice questions which have been ingeniously raised on their behalf.

If all these facts had to be rigidly proved, the expense and difficulty would be very great, and they would all be incurred for the mere purpose of turning out a man who had before been turned out of the possession as a wrongdoer, and as having no right to the possession against the very same title which he is desirous of contesting over again, without any pretence of right or title on his own part. We are glad to prevent so much injustice being done to the claimants. The rule will therefore be discharged.

Rule discharged.

BUTTERS V. GLASS.

Bought and sold notes—Variance.

In an action upon a contract for the sale and purchase of wheat by bought and sold notes, it appeared that the sold note made the wheat deliverable at Montreal afloat, "on arrival during the first half of August next," vessel to be named (meaning by the seller); while the bought note made it deliverable "during first half of August next, at seller's option." *Held*, a material variance, which avoided the contract.

The seller having named one vessel, *Semble*, that he could not, upon the facts stated in this case, alter it and substitute another, though under certain circumstances this might be done.

DECLARATION.—First count: that it was agreed the plaintiff should sell and deliver to defendant a cargo of about 15,000 bushels of number two Milwaukee Spring wheat in bond, at \$1.33 per bushel, and that defendant should accept the same in a vessel to be named at Montreal afloat, on arrival thereof during the first half of the month of August, 1870, and should pay for the same on delivery. Averment of general performance by plaintiff. Breach, non-acceptance of wheat by defendant and non-payment of price, whereby, &c.

Common counts were added.

Pleas: 1. To the first count, did not promise.

2. To first count, that on the 20th of July, 1870, defendant made with the plaintiff at Montreal a contract in the words and figures following:

No. 489. MONTREAL, July 20th, 1870.

To JAMES GLASS,

per W. W. STEWART,

MONTREAL.

I have this day sold to you for account D. Butters, Esquire, about (15,000) fifteen thousand bushels No. 2 Milwaukee Spring Wheat, in bond, at \$1.33 per bushel of 60 lbs., vessel to be named, deliverable here afloat during first half of August next, at seller's option. Terms, cash on delivery. No brokerage to be paid by you.

THOS. KERSHAW,
Broker.

That according to the usual and well known custom of the grain trade in Montreal the words "vessel to be named" meant and did mean, and were understood by plaintiff and defendant to mean, that the vessel containing the wheat should be named by the plaintiff, and upon the vessel being so named the contract then should become a contract for the purchase of the cargo of the vessel so named: that the said Thomas Kershaw, who signed the contract, was the broker and agent of the plaintiff, thereunto lawfully authorized: that afterwards, to wit, on the 8th of August, 1870, the plaintiff, by his said agent in Montreal, did in writing name to the defendant the vessel called and known as the "Kate Kelly," then afloat, as the vessel in which the said cargo of wheat was then contained: that at the said time the said "Kate Kelly" was afloat, loaded with a cargo of number two Milwaukee wheat of the plaintiff, consigned to Montreal; and thereupon the said contract became and was, according to the usual and lawful custom of Montreal, where the contract was made and the wheat was to be delivered, and according to law, a contract for the purchase of the cargo of the said vessel "Kate Kelly," to be delivered as aforesaid in the first half of the month of August: that the said vessel did not arrive at Montreal in the first half of August, nor had the defendant at any time thereafter any notice of the arrival of the said vessel at Montreal, nor did the plaintiff ever tender or offer to deliver the said cargo to defendant, although the defendant was up to the end of the first half of August always ready and willing to accept and pay for the same according to the contract; and that the contract in this plea is the contract in the first count mentioned.

3. To second count, never indebted. Issue.

The case was tried at the County of York Assizes before Morrison, J., in January last, without a jury.

The evidence was in effect as follows:

The bought note was as stated in the plea. The sold note was the same, except that it made the wheat "deliverable here afloat on arrival, during first half of August next."

Thomas Kershaw, said : I am a broker in Montreal. The two notes of contract are in my writing. About the 8th of August I saw plaintiff's clerk, and we spoke about the vessel to be named, and he gave me the name "Kate Kelly." I then went to my office and sent to Mr. Stewart, the agent and broker of defendant, and in a memorandum I gave him the name "Kate Kelly." At the time I spoke to the clerk I thought the option was for the whole of the month of August. I discovered after I saw Mr. Stewart the option was for the first half of the month. I went to plaintiff's clerk and told him I had made a mistake in telling him the option was for the whole of the month. He said he would make the vessel the "Acadia." The reason he changed was because it was impossible for the "Kate Kelly" to arrive in time for the first half of August to meet the contract. I then went to my office. Mr. Stewart's clerk came to me with my memorandum naming the "Kate Kelly." He asked when the vessel sailed from Milwaukee. I told him there was an error which I had caused, that the wrong vessel was named ; that it was the "Acadia." I got my memorandum as to the "Kate Kelly" and destroyed it. I called that evening at Mr. Stewart's office ; he was not in. A few hours only intervened between giving the name of the "Kate Kelly" and correcting the error ; all this was on the 8th of August. On the 9th of August I wrote Mr. Stewart naming the "Acadia" now waiting discharge, and saying the vessel named yesterday [was my error, in consequence of his having also bought a similar cargo for Nolan & Co., on same delivery, that is for the whole month. The "Kate Kelly" could come to Montreal, but she would have to tranship at Kingston. The "Acadia" came, but she landed part of her cargo at Kingston. I treated Mr. Stewart as defendant's agent. At the time I named the "Kate Kelly" she was afloat with a cargo of No. 2 Milwaukee wheat consigned to plaintiff, and it was not disposed of at the time to my knowledge. It was the plaintiff's wheat. I don't know when the "Kate Kelly" arrived. The capacity of the "Acadia" was about 15,000 bushels ;

don't know what her cargo at that time was. The wheat she had was of a quality to answer the contract, and I think there was sufficient to fill the contract. On the 15th of August wheat sold at \$1.03, on the 9th or 10th of August the price was about \$1.05; it declined to \$1.03; it was unsaleable.

William Perry, the plaintiff's clerk, spoke of telegrams received, and repeated a good deal of what Kershaw had stated. He said there was 14,493 bushels of wheat on the "Acadia" to answer the contract. The "Acadia" arrived in Montreal about the 8th of August; don't think she was there on the 6th. After the tender to defendant she was unloaded and her cargo stored and kept there till fall, and then sent to England.

Several objections were taken at the close of the plaintiff's case.

For the defence, *W. W. Stewart* said a good deal that need not be stated. He continued: About a fortnight after the contract defendant asked if the vessel had been named. On the 8th of August, about half past ten, a.m., I found at my office a note from Mr. Kershaw to the effect that the vessel containing the wheat for defendant was the "Kate Kelly," and as I was instructed by defendant to insure the cargo I sent our young man over to Kershaw to know the day the vessel left Milwaukee, so that I might insure if defendant desired to do so. He returned almost immediately, saying he had met Mr. Kershaw at the door, and that he would get the date from the plaintiff and give it to me. I heard nothing more from him that afternoon, which was the 8th; that same day I wrote defendant the letter produced. Next morning Mr. Kershaw told me in the news room he had named the wrong vessel; that it was the "Acadia" then in port ready for delivery. I said I had written to defendant, and he had better write to him also explaining the affair. He said he would write me before the evening, which he did not do. I wrote to defendant myself; can't say when the "Acadia" arrived in Montreal. On the 8th wheat was \$1.08.

James Esdaile, said: I am a broker. "Vessel to be named" means that the seller will name the vessel; that the wheat sold is on board, so that if the vessel is lost the seller is not bound to replace it. When the vessel is named, it is to protect the seller against having to replace it in case of the loss of vessel.

The learned Judge entered a verdict for the plaintiff, and assessed the damages at \$3,695.37. He reserved leave to the defendant to move to enter a nonsuit, or to reduce the damages to such an amount as the Court might direct.

In Hilary Term last *John Bell*, Q. C. (of Belleville), obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, on the following grounds:

1. That the declaration was not proved: that no valid or legal contract for the sale of the grain was proved; that there was no compliance with the Statute of Frauds.

2. That the bought and sold notes were not alike, and neither of them was signed by the defendant, nor his broker or agent.

3. That when the vessel the "Kate Kelly" was named, the contract became a contract for the purchase of her cargo, and that such cargo was never delivered or tendered to defendant, nor did it arrive within the time named in the contract, and defendant was not bound to accept any other cargo in lieu of it.

Or why the damages should not be reduced to the difference between the value of the grain on the day of its arrival in Montreal and the contract price, or by such other sum as the Court might direct. Or why a new trial should not be had, on the ground that the defendant was taken by surprise by the witness called by him to prove the custom of the grain trade in Montreal; and on grounds disclosed in the affidavits and papers filed.

In this term *McMichael* shewed cause, citing *Gorrissen v. Perrin*, 2 C. B. N. S. 689.

Bell, Q. C., supported the rule. There was a variance between the bought and sold notes. The former one contained the words, as in the second plea mentioned, "at seller's option" which the sold note did not contain, and according to the authorities this variance avoided the contract: *Thornton v. Kempster*, 5 Taunt. 786; *Bold v. Rayner*, 1 M. & W. 343; *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 747; *Cowie v. Remfry*, 5 Moo. P. C. C. 249; *Sieve-wright v. Archibald*, 17 Q. B. 115; *Benjamin on Sales*, 195-210. It is not clear that Kershaw had power to act for defendant, or that he did act for him. Defendant had his own agent and broker, Mr. Stewart, who acted in the transaction throughout: *Moore v. Campbell*, 10 Ex. 323; *Bos-tock v. Jardine*, 3 H. & C. 700. After the plaintiff's clerk gave the name of the vessel "Kate Kelly" to Kershaw, and he communicated it formally to Mr. Stewart for the defendant, he could not substitute another vessel for it. The cargo was not tendered to defendant on arrival of the "Acadia," although it was a falling market; the vessel had been in port for two or three days before it was offered to defendant. There should be a new trial at any rate on the affidavits filed, if a nonsuit is not entered: *Bold v. Rayner*, 1 M. & W. 343; 1 Sm. L. C., 6th ed., 549.

WILSON, J., delivered the judgment of the Court.

The variance between the bought and sold notes is, that the sold note concludes "deliverable here afloat *on arrival* during first half of August next," while the bought note concludes "deliverable here afloat during first half of August next *at seller's option*." By the seller's note he was to deliver the cargo whenever it arrived in the first half of August. By the buyer's note the delivery was to be whenever the seller chose in the first half of August.

It appears to us these are two very different things. Which of the two writings then can be said to contain and to express the bargain? The two instruments together are required to form a perfect agreement. When they differ in a material respect the result is, there is no contract.

As to the naming of the vessel, that had to be done by the seller of course. When it was done it was irrevocable; he could not alter it, and substitute another vessel in its stead: *Fragano v. Long*, 4 B. & C. 219; *Sparkes v. Marshall*, 2 B. & C. 761; *Brown v. The Royal Insurance Company*, 1 El. & El. 853; *Gath v. Lees*, 3 H. & C. 558; *Rugg v. Weir*, 16 C. B. N. S. 477.

If the plaintiff had not had such a vessel afloat loaded with the proper quality of wheat as he had named, or if there had been some other plain mistake by which the particular vessel could not have been delivered, as if it had been sold to another, or was sunk or destroyed at the time when it was named, or if the plaintiff had no such vessel at all, the naming of it could not, I think, have been binding on the plaintiff. He could in such a case have named another vessel for it. These, however, are not the facts here.

If, too, after the naming of the first ship another was desired to be put in its place, and that was assented to by the other party, possibly that change might have been supported without invalidating the rest of the contract. The plaintiff's testimony does not positively assert that the "Acadia" was substituted for the "Kate Kelly." The defendant's evidence expressly disproves it.

The affidavits we have not referred to. I incline to think they are not admissible. They appear to be legal opinions by the defendant and six or seven merchants and brokers as to the meaning of these very plain documents: the bought and sold notes between the parties. The objection about the Statute of Frauds has no application here at all. This was a Quebec contract; and we do not know judicially that the Statute of Frauds has or ever had any operation there. If it had or has, the defendant should have proved it.

Our decision is based upon the material variance between the bought and sold notes, ordinary mercantile instruments, as to the time of delivery.

The rule will be absolute to enter a nonsuit.

Rule absolute.

IN RE BAKER AND KENNEDY AND THE CORPORATION OF
THE TOWNSHIP OF SALTFLEET.*By-law to close and sell road allowance.*

A township corporation passed two by-laws, one, No. 145, providing that certain original allowances for roads described should be closed and sold by auction on a day named, due notice being first given; the other, No. 146, was to close up that portion of the original allowance for road between lots 32 and 33 in the fourth concession, lying north of the centre of the said lots (which forms the northerly boundary of Freeman's land, and south of the lands owned by C. B. and T. K., the applicants,) and comprising that portion of the said road allowance dividing the seven acres of land belonging to the heirs of the late M. C., and now occupied by Mrs. Joice; and to sell the same to Mrs. Joice at a price named.

Held, as to by-law 145, upon the contradictory affidavits set out below, that the objection for want of the necessary notices before passing such by-law was not sustained, there being also the fact that the applicants were heard several times in opposition to the by-law, but never raised this objection.

2. As to both by-laws, that it was not objectionable to provide for selling, as well as for closing up the allowance.
3. Nor as to by-law 145, that it provided for closing and selling the allowance by public auction, without providing for the rights of the owners of adjoining lands, for it was shewn that such owner became the purchaser.

Semble, that it might be sufficient to offer the old allowance *at the auction* to the owner of the adjoining land, and on his refusal to proceed with the sale.

As to by-law 146, it was objected, that it provided for the sale to Mrs. Joice, while it shewed on the face of it that the adjoining land was owned by others. It appeared that M. C. had died intestate, leaving children under age, and that Mrs. Joice was his widow. M. C. was not shewn to have been the owner, except by the statement in the by-law, and Mrs. Joice swore that she had owned the land for five years. *Held*, that this objection failed. *Held*, also, that the road closed up by this by-law was sufficiently described. It was objected, also, that the notice of the intended passing of this by-law described it as a by-law for closing up and selling the original allowance between lots 32 and 33, while the by-law as passed was to close up only a small portion of it. *Held*, no objection.

In Hilary Term last, *F. A. Read* obtained a rule calling on the Corporation of the Township of Saltfleet to shew cause on the first day of Easter Term thereafter, why by-laws numbered 145 and 146 of the said Council, or why by-law 146 and so much of by-law 145 as affected the road allowance between lots numbers 32 and 33 in the fourth concession of the said township, or any part thereof, should not be quashed with costs, on the following grounds:

As to by-law 145: 1. Because no proper notice of such by-law was posted up and published as required in that behalf. 2. Because provision is made in the by-law for selling as well as closing up a road allowance. 3. Because it provides for selling a road allowance by public auction, without providing for or disposing of the rights of the owners of the adjoining lands.

As to by-law 146: 1. Because no proper notice of such by-law was put up and published as required in that behalf. 2. Because provision is made in the by-law for selling as well as closing up a road allowance, and the sale is thereby made while the road yet remained open. 3. Because by the by-law a portion of the road allowance was sold to a party other than the party who on the face of the by-law is described as the owner of the adjoining lands, and no provision is made in the by-law for the rights of preëmption of the owner of the adjoining lands. 4. Because the portion of road sought to be closed is insufficiently described.

And as to both the by-laws: because the closing up and sale of the road allowances mentioned in the by-laws would greatly inconvenience the public in general and the applicants in particular.

By-law 145, passed on the 4th June, 1870, was intituled A by-law to authorize the sale and conveyance of certain portions of the road allowance for road in the township of Saltfleet.

It recited that the allowances would not be required for public travel: that it was advisable they should be sold by public sale: that the requirements of section 323 of the Municipal Act had been complied with, and that no public roads had been opened in lieu of the said allowances, so that the same did not come under the restrictions contained in sub-section 6 of section 323. It then enacted that the portion of the original allowances for roads therein described should no longer be deemed public allowances for roads, and that the same should be closed and abolished as highways, and that they were assumed by the Corporation for

the purposes of sale : that the same should be sold and disposed of by public auction for cash on the 26th day of December then next, at the council chamber in the village of Stony Creek, due notice of such sale being first given by printed notices being posted up in at least six of the most public places in the township, and also in the neighborhood of the property to be sold : that the lands should be sold in parcels or lots ; and that the portion of the allowance for road lying in front of each lot of the said lots, and between lots in each concession, should comprise separate and distinct parcels. Provision was then made for the conveying of the lands sold. The road allowances to be sold were as follows : 1. That in front of lots Nos. 25 to 31, both inclusive, in the fifth concession. 2. That in front of lots Nos. 31 and 32 in the sixth concession. 3. That between lots Nos. 30 and 31 in the sixth concession. 4. That between lots Nos. 26 and 27 in the third concession. 5. That between lots Nos. 32 and 33 in the sixth, fifth, and south half of the fourth concessions. 6. That between lots Nos. 26 and 27 through the first, second, and third concessions and broken fronts. 7. That between lots Nos. 32 and 33 in the broken front.

By-law 146, passed on the 2nd July, 1870, was substantially the same as 145, but it was to close up "that portion of the original allowance for road between lots Nos. 32 and 33 in the fourth concession lying north of the centre of the said lots (which forms the northerly boundary of Freeman's land), and south of the lands owned by Christopher Baker and Thomas Kennedy, and comprising that portion of the said road allowance dividing the seven acres of land belonging to the heirs of the late Martin Connors, and now occupied by Mrs. Joice ;" and that the same "be sold to Mrs. Mary Joice (the person in occupation of the same) at the price or sum of \$60 per acre."

Numerous and contradictory affidavits were filed on either side as to the questions of fact involved in the objections, the substance of which affidavits is sufficiently stated in the judgment.

In this term, *Moss* and *A. C. Chadwick* shewed cause. The notices as to by-law 145 are proved by Jones and by other persons. It is contended that the notices of by-law 146 are not sufficient, because they are to close the whole road allowance between the lots, and the by-law is to close only a part of it; but it can be no objection that all which is notified to be done is not ultimately done. (a) The council might sell to Mrs. Joice that part of the road allowance running through her land; they might sell to any one and on any terms they pleased: Municipal Act, sec. 345. These applicants cannot object to want of notice or want of sufficient notice, for they knew of everything that was proposed to be done before it was done, and they attended at all the council meetings and opposed the passage of the by-laws: *In re Lafferty v. Municipal Council of Wentworth and Halton*, 8 U. C. R. 232; *Parker v. The Municipalities of the United Townships of Pittsburgh and Howe Island*, 8 C. P. 517; *Scarlett v. The Corporation of York*, 14 C. P. 161; *Taylor v. The Corporations of the Township of West Williams*, 30 U. C. R. 337. It is objected that the by-law is for selling as well as closing the allowance, and that the rights of adjoining proprietors should be protected. These parties have nothing to do with that part of the allowance closed by by-law 145. The person who has bought that part of it is Mr. Freeman, who owns the lands on each side of it. But it is not necessary that adjoining proprietors should be protected: Municipal Act, secs. 334, 345 sub-sec. 2. Such a road as this is not within the operation of sec. 333, sub-sec. 6.

F. A. Read supported the rule. As to by-law 145, it is not shewn that any notice was given in the vicinity of the

(a) The notice was as follows:—Notice is hereby given that an application will be made to the Municipal Council of the Township of Saltfleet, at a meeting to be held at McMillan's Hotel, in the village of Stony Creek, on Thursday, the 16th day of June next, at two o'clock p.m. to pass a by-law closing up and disposing of the original allowance for road between lots Nos. 32 and 33 in the fourth concession of the said township of Saltfleet.

R. K. SMITH, *Township Clerk.*

Dated the 11th May, 1870.

road. The affidavits are contradictory as to the notices. The notices should have been in the vicinity: sec. 323. It is said no objection was taken to want of notices when parties were before the council; but that does not preclude them from now taking it. It is not said the notices were up for a month, but for four weeks: secs. 323, 345 sub-sec. 2. The allowance should not have been stopped up to the public inconvenience: *Moore v. The Corporation of the Township of Esquesing*, 21 C. P. 277; nor where any one will be excluded from ingress, &c. to his land from such road: sec. 320. Here the parties will be excluded: Sec. 333, sub-sec. 6 applies to all roads, and here no offer has been made to the adjoining proprietors; the land has been sold to others direct. The by-laws are therefore bad. The council did not first put a reasonable price on the land before selling it. The applicants are willing to let by-law 145 stand if by-law 146 be quashed; they agreed to do so. The sale should have been under section 345. The by-law 146 should not have sold the road before it was closed, and it could not be closed till the county council approved of the by-laws. The land has been sold to Mrs. Joice which is more particularly in dispute; and she is not the owner of the adjoining land, but the widow of the owner, and he has left children, who are his heirs at law. The part now in question is imperfectly and improperly described.

WILSON, J., delivered the judgment of the Court.

The sections of the Municipal Act referred to were 323, 333, 334, 345 sub-sec. 2.

The Township Council shall not pass a by-law for stopping up or selling any original allowance for road until notices of the intended by-law have been posted up one month previously in six of the most public places in the immediate neighbourhood of such original allowance, and published weekly for at least four successive weeks in some newspaper (if there be any) published in the municipality; or, if there be no such newspaper, then in a

newspaper published in some neighboring municipality; nor until the council has heard any one whose land might be prejudicially affected thereby, and who petitions to be heard: sec. 323,

As to by-law 146, the objection as to want of notice was given up, and that is the one which the applicants say they would be satisfied to have quashed, and leave the other to stand.

As to by-law 145, Mr. Lawson, one of the proprietors of the *Hamilton Spectator* (there being no newspaper published in Saltfleet, and Hamilton being a neighboring municipality), says that a copy of by-law 145, and the notice attached to it, was published in his newspaper for eight successive weeks, commencing on the 13th of April, 1870.

Fagan says he saw one of the copies of the by-law 145 posted up in the vicinity of the road allowance.

Jones says the council was satisfied before the passing of by-law 145 that all the proper notices had been given: that he caused to be printed forty copies of that by-law, and the notice thereto, of which the exhibit D. is a copy, and caused the same to be properly posted in all the most conspicuous places in the municipality at least four weeks previous to the 4th of June, 1870.

Adolphus Freeman says he saw posted up in the neighborhood of this road allowance several of the large notices, of which D is a copy (by-law 145 and notice) and at other places in the municipality, about the time of its date.

These statements are quite sufficient to counterbalance the affidavits of Kennedy and Baker, upon the authority of the cases, *In re Lafferty v. Municipal Council of Wentworth and Halton*, 8 U. C. R. 232; and *Parker v. The Municipalities of the United Townships of Pittsburgh and Howe Island*, 8 C. P. 517, which indicate rather that the notices are more directory than mandatory.

Besides, these applicants were heard frequently by the township council, and also by the county council in opposition to the by-laws, and never alleged, either by themselves

or by their counsel, who appeared several times for them, that due and full notices had not been given.

Then it is said that provision is made in the by-laws for selling the allowance as well as stopping it up.

By-law 145 is for closing the road, and that the same be sold by auction at a time and place named in the by-law. By-law 146 is for closing the road and selling it to Mary Joice, the person in occupation of the same, at the price of \$60 per acre.

There can be no objection to the by-laws providing both for the closing up and sale by auction or otherwise of a road allowance, unless there be reasons to the contrary why that course cannot or ought not to be adopted.

The council is authorized to sell the road allowances generally, in any manner and to any persons they please, subject to certain exceptions.

By sec. 333, sub-sec. 6, the road allowance is to be sold to the parties next adjoining whose lands the same is situated, where a public road has been opened in lieu of the original allowance, and for the site or line of which compensation has been paid.

The council may also sell to the owner of any adjoining land any road legally stopped up. That is what the council has done by selling to Mr. Freeman and Mrs. Joice, who were the owners of the adjoining land; and the alternative of what the council is to do in case such parties refuse to purchase does not arise.

I need not state the provisions of section 334, which is the only one that can be said to have any bearing on this part of the case, for they do not, in my opinion, apply to the facts at all.

The third objection to by-law 145, that it provides for selling and closing the allowance by public auction, without providing for or disposing of the rights of the owner of adjoining lands, is, in my opinion, sufficiently answered by its being shewn that the adjoining owner, the person through whose land the road allowance ran, and who had always been in possession of and cultivated it, did in fact

become the purchaser of it. He is the only person who could properly have complained of the provision.

But it is not certain that the by-law is objectionable in that respect. The council are to sell to the owners of the adjoining lands, and in case they refuse to buy at a reasonable price, the council may sell to any other person at the price the other refused to give, or a higher price.

I do not see why all that might not be done at a public auction. Why might not the adjoining owner or owners be then and there offered the road allowance at such price as the council might have determined should be asked for it; and if he or they refused to give it, why might not the auction go on at the price at which it had been so offered as the upset price?

I do not say that would be the most convenient or business-like mode of proceeding; but when it is objected that the by-law is inherently vicious and illegal on that account, I should not be disposed to give effect to the objection, unless I were assured some substantial wrong, and injustice had been occasioned by it. Here nothing of the kind has been done, but the very persons have got the allowances whose pre-emptive rights as adjoining owners the applicants are so anxious to protect.

The next objection to by-law 146 is, that the portion of the road allowance sold to Mrs. Joice has been sold to her, although on the face of the by-law another party is described as the owner of the adjoining lands.

The by-law describes the portion of the allowance in question as "dividing the seven acres of land belonging to the heirs of the late Martin Connors, and now occupied by Mrs. Joice," and it directs that such portion shall be sold to Mrs. Joice, who is in possession of that particular part of the road allowance.

Baker, in his affidavit filed in reply, says Martin Connors is dead; Mary, his widow, married Patrick Joice, and is the Mary Joice who claims part of the road allowance; and that Martin Connors died intestate, leaving three children, who are living, and are all under twenty-one years of age.

It does not appear that Martin Connors was the owner of the seven acres, excepting by the statement in the by-law. The by-law cannot conclude the rights of parties by such statements. Mary Joice swears that she has owned the land in question for the last five years.

It is manifest the right must be between herself and her children, and we should not be disposed to avoid the by-law or sale under it on the application of a mere stranger, under the pretext that he was desirous only of serving the rights of the true proprietor. The question between Mrs. Joice and her children, if there be any, can be better settled by a different remedy than by vacating the by-law and the sale under it to answer the private purposes of these applicants.

It is then said the portion of road closed up by by-law 146 is insufficiently described. In our opinion it is well described.

Lastly, it is objected to both by-laws that the closing up and sale of the road allowances will greatly inconvenience the public in general and the applicants in particular.

That it will not inconvenience the public has been most satisfactorily established. And that it will inconvenience the applicants does not seem to be very evident from the facts advanced against their motion; and they do not say they will be excluded from ingress and egress to and from their lands or places of residence. The portion of the road allowance which is adjoining their lands is still open and untouched by the by-laws from the third concession line on the north to the southerly limits of their land.

It was said in argument, though it is not contained in the rule, that by-law 146 was invalid because the notice of its intended passing stated that the original allowance for road between lots 32 and 33 in the fourteenth concession would be closed and sold, which, it was said, meant the whole of the allowance between these lots, while the by-law based upon it is to close and sell only the small portion of it which was sold to Mrs. Joice. It was contended there could be no departure from the notice published.

No doubt a notice that the road allowance between lots 31 and 32 would not authorize a by-law to close the allowance between 32 and 33. But that the notice must be literally followed, and nothing less closed by the by-law than the notice said it was proposed to close, would be very unreasonable. The council might be led to modify their intention after hearing the parties who were opposed to the notice as it was given. And they might, if necessary, abandon their intention altogether. It is clear this objection, the last effort to resist the action of the council, must fail.

The case has been fully and satisfactorily answered by the township council in every particular.

I should notice here that in all the affidavits and papers Baker's Christian name is stated to be Christopher Baker, and he is so described in the body of all the papers where his Christian name is given, while he subscribes the affidavits in the name of *Christian* Baker, written apparently in a Dutch or German hand.

The rule will be discharged, with costs to be paid by the applicants.

Rule discharged.

CALVIN ET AL. V. DAVIDSON.

False representation of authority to contract for Company—Action for—Want of corporate seal—Pleading.

Declaration, that a certain vessel insured in the Provincial Ins. Co. was sunk, and that defendant, who was the agent of the Company in effecting settlements on account of vessels lost or damaged, in consideration that the plaintiff would contract with defendant as and assuming to be the agent of the Company, to raise the vessel for \$3,100, the question of the liability to pay said sum to be referred to arbitration, defendant promised the plaintiff that he was authorized by the Company to enter into said contract as their agent, as follows, (the contract was then set out, made between the plaintiffs and the Company, and signed by defendant for the Company): that the plaintiffs entered into such contract with defendant as and assuming to be the agent of the Company, and raised the vessel; yet defendant was not authorized by the Company to make such contract, and refused to pay the plaintiffs the \$3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the contract against the Company, and were put to expense, &c.

Plea: that the plaintiffs were unable to enforce the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the Company.

Held, on demurrer: 1. That there was no assertion in the declaration of defendant being the agent inconsistent with the allegation of his want of authority.

2. That the plea shewed no defence, for if defendant had been authorized as he represented, the Company could have been compelled in equity to affix their seals to the contract.

DEMURRER. The defendant pleaded to the first count of the declaration, and the plaintiffs demurred to the plea, but gave up the demurrer on the argument. Judgment was therefore given for the defendant on that demurrer.

The second count stated, that before and at the time of the promise therein mentioned, a ship or schooner called the "Rapid," owned by one James Stevenson and one Thomas Harbottle, had struck on a pier in the harbour of Kingston, and was lying sunk in the harbour, the said vessel before and then being insured against the perils and adventures of the lakes, &c., in the Provincial Insurance Company and in the Home Insurance Company; and that the defendant—who before and at the time of the making of the said promise had been and was the agent and servant of the Provincial Insurance Company, and employed by them in effecting settlements of the amount to be paid

by the said Company on account of vessels insured by them which had suffered loss or damage—in consideration that the plaintiffs would enter into a contract with the defendant as and assuming to be the agent of the Provincial Insurance Company, to raise the said vessel and place her on the ways of the Kingston Marine Railway, at and for the price of \$3,100, the question of the liability to pay the said sum and the other expenses attendant on the repair of the vessel to be referred to arbitration, the defendant promised the plaintiffs that he was authorized by the Provincial Insurance Company to enter into the said contract as their agent, as follows, that is to say: “Articles of agreement made the 13th day of September, 1864, between Delino Dexter Calvin, and Ira A. Brock, of the first part, and the Provincial Insurance Company of the second part. Whereas, &c., [setting it out *verbatim*, and signed as follows]:—“Calvin & Brock ; A. Davidson, for Provincial Insurance Company ; Robert Patterson, for Home Insurance Company.” And the plaintiffs entered into the contract with the defendant as and assuming to be the agent of the Provincial Insurance Company, and the plaintiffs, relying on the promise of the defendant, did afterwards, and without delay, proceed to and did raise the said vessel, &c.; yet the defendant was not authorized by the said Company to make the contract for them as their agent, and afterwards refused to pay the plaintiffs the sum of \$3,100, or to refer the question of liability to pay the same to arbitration in the manner provided in the contract although requested by the plaintiffs so to do—by reason whereof the plaintiffs were not able to enforce the performance of the contract against the Company, and the plaintiffs lost the benefit thereof, and were put to great expense in performing the contract, and incurred great expense in endeavouring to enforce the performance of the contract against the Company, and in unsuccessfully suing the Company in the Courts of Queen’s Bench and Common Pleas, in respect of the said contract, whereby, &c.

Fourth plea, to the second count: The defendant says

the plaintiffs were not able to enforce the said contract against the said Company, then and still being an incorporated Company, not because the defendant was not authorized by the Company to enter into the contract, but because the contract was and is, and as set out and shewn in the second count, a parol contract to execute another contract, and was not, as the plaintiffs well knew at the time of the execution thereof, made under the corporate seal of the Company.

The plaintiffs demurred to the plea, on the grounds that the plea admits the promise and the breach of it, and does not justify or excuse or avoid the same; the plea is pleaded to damages only.

Joinder.

Harrison, Q.C., for the demurrer. The defendant contends he is not liable, although he had no power to contract, merely because the agreement is not under the corporate seal of the Company. He contends also that as the damage happened not from his want of capacity to contract, but was occasioned altogether by the want of the corporate seal to the bargain, there is no liability upon any one. But the plaintiffs are entitled to recover although there was no special damage, and although the damage that was suffered was sustained only from the want of the corporate seal, and not from the want of authority in the defendant to contract: *Collen v. Wright*, 7 E. & B. 301; *Cherry v. The Colonial Bank of Australasia*, L. R. 3 P. C. 24; *Royal Canadian Bank v. Goodman*, 29 U. C. R. 574; *Calvin v. Provincial Insurance Company*, 20 C. P. 21, 267.

J. H. Cameron, Q. C., and *John Duggan, Q. C.*, contra. The second count shews the defendant had the power to do the act which it afterwards alleges he had not the power to do. It was that construction of the count which induced the Court of Common Pleas, in 21 C. P. 21, to determine that there was a sufficient allegation of authority from the Company to the defendant to contract for them contained in the count. The count is objectionable

or insufficient in alleging that the defendant refused to pay or to go to arbitration, while it should have alleged that the Company refused to do so: *Pow v. Davis*, 1 B. & S. 220; *Downman v. Williams*, 7 Q.B. 103; *Collen v. Wright*, 7 E. & B. 301, affirmed in Ex. Ch. 8 E. & B. 647; *Randell v. Trimen*, 18 C. B. 786.

WILSON, J., delivered the judgment of the Court.

The second count states that the defendant was the agent of the Provincial Insurance Company "in effecting settlements of the amount to be paid by the Company on account of loss sustained by vessels which the Company had insured." And that in consideration the plaintiffs would enter into a contract with the defendant, "as and assuming to be the agent of the Company," the defendant promised he was authorized by the Company to enter into the contract as their agent, and that the plaintiffs did enter into the contract with the defendant, "as and assuming to be the agent of the Company." And it alleges as a breach that the defendant was not authorized by the Company to make such contract with the plaintiffs. There is no repugnancy or contradiction in saying the defendant was the agent of the Company empowered to make such a contract, as opposed to the complaint of the plaintiffs that he was not so authorized.

The defendant was an agent to adjust losses. And the averment that the defendant contracted "as and assuming to be the agent of the Company," is no assertion by the plaintiffs that he was in fact the agent of the Company authorized to contract for them, but the contrary. It is because he did the act "as and assuming to be the Company's agent" that his liability accrued, and but for that fact he would not have been liable. It is very plain, if the defendant had not contracted "as and assuming to be an agent of the Company," this action could not have been sustained. There can be no repugnancy therefore in stating as a fact that the defendant assumed the power to act for another, when the complaint against him is that he did not possess the power although he assumed to exercise it.

The main question is, whether the plea, which states that the reason why the plaintiffs could not enforce the contract against the Company was not because the defendant was not authorized to make it, but because the contract was not under the corporate seal of the Company, is a good defence.

If the defendant had possessed the authority to contract on behalf of the Company to the extent that he assumed to act for them in this case, and the only objection to the contract had been that the formal part of it, the seal of the Company, had not been placed to it, the absence of a seal would have been no absolute and irrevocable bar to an action being maintained upon it against the Company. The Court of Chancery would have obliged the Company to attach their corporate seal to the agreement, or would have prevented them from pleading the want of the seal at law, or would have given other adequate relief in its own Court.

In this case there can be no object in the plaintiffs attempting to get the corporate seal attached. They would fail because the Company, by reason of the defendant's want of power to contract, had never contracted, as was the case in *Collen v. Wright*, 7 E. & B. 301, and 8 E. & B. 647.

The plea admits that the plaintiffs cannot compel the Company to affix the seal or to perform the defendant's contract. Does it not then confess a breach of the defendant's promise, and a ground of damage to the plaintiffs?

It may be quite true that the plaintiffs failed to recover in the Courts of law solely because the contract was not under the corporate seal of the Company; but does that absolve the defendant from responsibility, when that contract, but for his want of authority, would still have been available to the plaintiffs as a perfectly valid contract in or by means of the Court of Equity?

The plaintiffs' failure at law, when it is manifest they must have failed from the cause stated, may be a good reason why they should not recover from the defendant the

costs of these abortive proceedings. But it appears to us to be no reason why he should not recover compensation of some kind, and to some extent, for the defendant's admitted breach of agreement.

It is quite clear, if the count had shewn an application to Chancery to oblige the Company to seal the agreement, and that the plaintiffs had failed there, this action would then have lain against the defendant, and the costs of the Chancery proceedings would probably also have been recoverable, for that would have been the very case of *Collen v. Wright*.

There are many cases which shew that the Courts of Law are bound to recognize that branch of the law which is administered in Courts of Equity: One of them is *Sims v. Marryat*, 17 Q. B. 288, 292.

We know, then, that if the defendant had possessed the authority which he professed to have, this contract could have been made perfect by an application to Chancery for that purpose. We know on the pleadings no application could be successfully made there. We know too that the plaintiffs cannot enforce that contract at law because it was made without authority to bind the Company, and because also it is not under the corporate seal.

The mere want of the seal is a formal and unsubstantial objection remediable in Equity. The want of authority to contract at all is the incurable and substantial difficulty which occasions the loss to the plaintiffs, and for which the plaintiffs have no remedy but on the personal engagement of the defendant which he has broken.

We think a full and good cause of action is stated in the count, which the plea has not efficiently answered, and that there should be judgment on the demurrer to the fourth plea for the plaintiffs, and on the demurrer to the third plea, which the plaintiffs admitted they could not support, for the defendant.

Judgment accordingly.

ROBERTSON V. CALDWELL.

Hope v. Caldwell, 21 C. P. 241, followed.

Per Wilson, J.—The plea was bad, for not alleging that the note, under the facts stated, was void by the law of Quebec, by which the validity of the note must be decided.

THE plaintiff sued in the second count on a promissory note for \$1000, dated 8th January, 1870, made by defendant, payable to one B. Devlin, and by him endorsed to the plaintiff. The defendant pleaded an equitable plea, similar to that in the case of *Hope v. Caldwell*, 21 C. P. 241.

The cause was tried at Toronto, before Hagarty, C.J., C.P., in the spring of 1870, when a verdict was taken for the plaintiff, with leave reserved to the defendant to move for a nonsuit.

J. H. Cameron, Q.C., in Easter Term, 1870, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved.

In Michaelmas Term following, *C. S. Patterson* shewed cause, and *Cameron*, Q. C., supported the rule.

RICHARDS, C. J.—This action was tried at the same time as that of *Hope v. Caldwell*, reported in 21 C. P. 241. This case cannot be distinguished from that, and I think we should follow their decision, and make the rule absolute to enter a nonsuit for defendant on the second count, pursuant to the leave reserved at the trial.

WILSON, J.—I am of opinion the plaintiff must fail on the second count.

The special plea on equitable grounds was proved, and the defendant should have a verdict on it unless the plaintiff enters a *nolle prosequi* as to that count.

There may be a difficulty in the plaintiff being nonsuited on one count.

The plea in question is bad in my opinion. The plaintiff should have demurred to it.

It should have alleged that the giving of the note, under

the circumstances stated in the plea, made it void by the law of the Province of Quebec. Without that statement it is deficient and insufficient.

The plaintiff might have replied what the law of Quebec was as to this transaction, to have shewn its validity, and so have cured the defective plea; but he was not bound to do so.

The defendant had to repel an apparently good cause of action against him, and he does not do so by shewing the note was given in the Province of Quebec for a consideration arising there between parties resident there—the payees permanently, as it must be presumed by their being attorneys of the Courts there, and the defendant a temporary resident there at any rate—unless he shew also that by the law of Quebec, which governs this contract, the whole transaction is void.

■ I cannot comprehend how it is possible to apply the law of Ontario to the note in question. The same principle would make it necessary to apply the law of the State of New York to it, if the action were brought there, and the law of France, or of Mexico, or of England, accordingly as the suit was brought in the one or other of these countries. And by the law of England, as it is now by the 33 & 34 Vic., ch. 28, the plaintiff would unquestionably recover on a disclosure of the whole facts.

In fact this question has not properly arisen.

In *Hope v. Caldwell*, 21 C. P. 241, which is on a note of the same nature, and between parties substantially the same as in the present action, the decision, in my opinion, should have been for the defendant simply because his plea was proved, without reference to the completeness or structure of the plea, and without reference to the nature of the replication pleaded or which should have been pleaded to it.

It is for that reason I feel it necessary to state, that if the question be properly raised, I do not consider I am bound by that decision to hold the plea sufficient.

I need not cite authorities or state my argument further

to support the opinion I have expressed, for it would not affect the present motion. The plea was proved, and the verdict must follow the proof. It is for the plaintiff to counteract that if he can.

Rule absolute.

IN RE THE ELECTION FOR THE WEST RIDING OF DURHAM.

*Legislative Assembly—Resignation—Vacancy—32 Vic. ch. 4,
secs. 10, 12, 13. 14.*

Secs. 10 and 12 of 32 Vic., ch. 4, O, provide that a member may resign, 1. by giving notice in his place of his intention, 2. by delivering to the Speaker a declaration of such intention, either during a session or in the interval between two sessions; or, 3. by delivering it to any two members, in case there is no Speaker, and the resignation is made in the interval between two sessions. *Held*, to mean only an interval between two sessions of the same assembly, and not to apply to the interval between the last general election and the election of a Speaker.

Sec. 13 provides for a new election in case of a vacancy happening by the death of any member, or by his accepting any office, or by his becoming a party to any contract, as mentioned in the third section. And sec. 14, for the case of a vacancy arising subsequently to a general election, and before the first meeting of the assembly thereafter, "by reason of the death or other of the causes aforesaid."

Held, that the "other of the causes aforesaid" were the two other causes besides death mentioned in sec. 13; and that a voluntary resignation, therefore, did not create a vacancy within sec. 14.

J. K. Kerr, applied for a rule *nisi* calling on *Salter J. VanKoughnet*, Esquire, the Clerk of the Crown in Chancery, to shew cause why a writ of mandamus should not issue commanding him to issue a writ for the election of a new member to represent the electoral division of the West Riding of Durham in the Legislative Assembly of the Province of Ontario, in place of *Edward Blake*, who had resigned or vacated his seat as member for the said electoral division in the said Legislative Assembly, upon the ground that the said *Edward Blake* had so resigned and vacated his said seat, and a warrant had been duly addressed and delivered to the said *Salter J. VanKoughnet* requiring him to issue such writ.

It appeared by the affidavits filed that *Mr. Blake* was elected on the 14th day of March last at the last general

election for the said Assembly, and that the Returning Officer duly made his return of such election to the Clerk of the Crown in Chancery, which return bore date the 14th, and was received by the said Clerk on the 16th, of March last: that the election had not been contested nor any petition filed against it; and that since the last general election for the said Legislative Assembly no person had been elected Speaker of said Assembly.

On the 5th of May last Mr. Blake, by writing under his hand and seal, addressed to Adam Crooks and Thomas Hodgins, Esquires, two members of the said Assembly, declared his intention to resign his seat in the said Legislative Assembly as member for said electoral district, and did thereby resign his seat accordingly.

And on the same day Messrs. Crooks and Hodgins signed and sealed a warrant addressed to the said Salter J. VanKoughnet, reciting that they had received such declaration; and authorizing and requiring the said VanKoughnet to issue a new writ for the election of a member in the place of the said Edward Blake.

A duplicate of this warrant was delivered to Mr. VanKoughnet on the 8th of May, and on the 22nd he refused to issue the writ, saying that in his judgment he had no right to do so. On the same day this application was made.

WILSON, J., delivered the judgment of the Court.

As a rule the member of Parliament, elect or fully installed, cannot renounce his election or resign his seat of his own mere motion. It is a trust not for himself but for the public benefit.

If there be a voluntary resignation, it must be made under the authority of a Statute.

In this Province the Statute 32 Vic. ch. 4, sec. 10, has provided for the resignation by members of the Legislative Assembly:—

1. By their giving notice in their places in the Assembly of their intention to resign.
2. By their delivering to the Speaker a declaration in

writing of their intention, under their hands and seals, made before two witnesses, either during a session or in the interval between two sessions ; or, under sec. 12,

3. By their delivering the declaration to any two members of the House, in case there is no Speaker, and in case the resignation is made in the interval between two sessions.

These two sessions mean, no doubt, two sessions of the same Parliament or Assembly, or at all events refer to a period when there is a Speaker.

There is no other case of a voluntary resignation provided for, or, what is the same thing, there is no other mode by which a voluntary resignation can be made or completed, than by one of these three methods specifically pointed out.

None of these courses can be adopted in the present case, unless it can be brought within the operation of the 14th section, for the House is not in session, there is no Speaker, and this is not an interval between two sessions.

Is this case, then, within the operation of the 14th section ? That section provides that in the case of a "vacancy arising subsequently to a general election, and before the first meeting of such Assembly thereafter, by reason of the death or other of the causes aforesaid," a new election may be had.

The question is, is a voluntary resignation a vacancy by reason of *other of the causes aforesaid* ?

No doubt a vacancy may be caused by resignation. The vacancy specially referred to is that which is caused by "death or other of the causes aforesaid."

The preceding 13th section is the one which it is said the Clerk of the Crown in Chancery has decided to be the one which limits and gives the meaning to the language of the 14th section.

The 13th section applies to any vacancy which happens "by the death of any member, or by his accepting any office, or by his becoming a party to any contract, as mentioned in the third section of the Act."

The vacancy by death, which is expressly mentioned in

the 14th section, is one of the causes which is expressly mentioned in the 13th section as creating a vacancy.

The other two causes which are expressly mentioned in the 13th section as creating a vacancy, the acceptance of office, or becoming party to a contract, are not, as in the case of death, repeated verbatim in the 14th section, but they are in our opinion those causes which are referred to in and by the 14th section as "other of the causes aforesaid," and therefore a voluntary resignation is not one of the causes embraced or referred to in the 14th section.

The case of resignation or vacancy by resignation had before been dealt with and provided for. The case of vacancy by death, by acceptance of office, and by becoming party to a contract, had then to be provided for. That is done by the 13th and 14th sections and their subsections.

The 13th section provides for proceeding in the following manner when a vacancy happens by any of the means therein specified :—

1. By any member of the House in his place informing the Speaker of the vacancy ; or

2. By any two members of the House notifying the vacancy in writing to the Speaker under their hands and seals.

3. If when the vacancy happens, or at any time thereafter before the Speaker's warrant for a new writ has issued, there be no Speaker, or the Speaker be absent from the Province, or the member whose seat is vacated be himself the Speaker, then any two members of the House may address their warrant under their hands and seals to the Clerk of the Crown in Chancery, for the issue of a new writ for a new election.

It may have been doubted whether the case of a vacancy happening "where there was no Speaker," applied to the case of a newly elected House before a Speaker had been elected at all, and more particularly as the notice or warrant when given by two members was to be by "two members of the House."

It has not been quite free from doubt when a person

elected becomes a member, and whether he may not be a member to act on committees though not a member to vote in the House: *Miller v. Salomons*, 7 Ex. 501, 502.

The 14th section seems therefore to have been passed to extend the like provisions of the 13th section to vacancies "arising subsequently to a general election," and before the first meeting of such Assembly, and to give the power to any two "members elect," instead of to two members of the House, to act in these arrangements. We think this was the purpose the Legislature had in view, and for which it has provided. The two sections are to be read and are applicable to the same matters, to vacancies arising by the same means, but arising in the one case before the first meeting of the Assembly after a general election, and in the other case after the meeting of that Assembly, and so long thereafter as the Assembly shall continue in existence.

The Clerk of the Crown in Chancery has, we think, construed the Statute correctly, and the rule must be refused.

I have expressed no opinion whether the writ could have gone, if our opinion had been the other way. It is not necessary I should do so. I can only say the general law is, that all officers who have to perform a public duty, and who refuse to perform it, may be compelled to perform it through the power of the Court. There could be no encroachment on parliamentary privilege by enforcing a plain duty which the Legislature has declared should under certain circumstances be performed by a particular functionary.

The rule will therefore be refused.

Rule refused.

IN THE MATTER OF THE ELECTION FOR THE WEST RIDING
OF THE CITY OF TORONTO.*Controverted Elections Act of 1871—Presentation of Petition—Computation
of time.*

The Interpretation Act of Ontario, 31 Vic. ch. 1, sec. 6, and sub-sec. 13, enacts that in construing it or any Act of Ontario, certain days specified, including Good Friday and Easter Monday, shall be included in the word holiday; and the Controverted Elections Act of 1871, sec. 52, enacts that in reckoning time for the purposes of that Act, any day set apart by any Act of Ontario for a public holiday shall be excluded.

Held, that the effect of the Interpretation Act alone, independently of any other statute, was to make the days mentioned in it holidays; and if this were not so, that when the other statute used the word holiday, such days would by virtue of the Interpretation Act be included in it.

Held, therefore, that in reckoning the twenty-one days after the return allowed for presentation of a petition, Good Friday and Easter Monday must be excluded.

The decision in Chambers in this matter, 7 C. L. J. N. S. 179, affirmed as regards the computation of time.

THE respondent was elected a Member of the Legislative Assembly of Ontario for the Electoral District of West Toronto, on the 21st March, 1871. On the 3rd April the Returning Officer executed his return declaring the respondent so elected, and on the following day posted it addressed to the Clerk of the Crown in Chancery. On the 1st of May a petition was filed, praying that the said election should be set aside on the grounds of bribery, treating, and undue influence.

A summons was obtained in Chambers to strike the petition off the files, on the ground that it was filed after the period of twenty-one days from the return made had elapsed.

Sec. 6, sub-sec. 2, of the "Controverted Elections Act of 1871," says that the petition shall be filed within twenty-one days after the return made to the Clerk of the Crown in Chancery; and sec. 52 enacts that "in reckoning time for the purposes of this Act, Sunday, and any day set apart by any Act of the Legislature of Ontario for a public holiday, fast, or thanksgiving, shall be excluded."

Good Friday and Easter Monday intervened between the return and filing the petition, and the question was whether

these days were to be excluded. The learned Chief Justice of the Common Pleas held that they were. See 7 C. L. J. N. S. 179, where the argument and judgment in Chambers are fully reported.

Crooks, Q. C., the respondent in person, obtained a rule *nisi* to rescind the order discharging the summons.

Harrison, Q. C., shewed cause. No appeal lies. Rule 50 of the Election Rules, *ante* p. 239, says that all interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, &c. This means determined, or finally disposed of. The two days in question must be excluded. The Interpretation Act of Ontario, 31 Vic. ch. 1, sec. 6, and sub-sec. 13, enacts that in construing that or any Act of Ontario, "the word holiday shall include Good Friday, Easter Monday," &c. By this Act, and sec. 52 of the Controverted Elections Act, these days are clearly excluded, as held by the learned Chief Justice, in computing the 21 days in question.

Crooks, Q. C., the respondent in person, *contra*, contended that the Interpretation Act did not set apart these days, but enacted only that they should be included under the word "holiday" when used in any other Act: that the effect of sec. 52 was merely to exclude any day set apart by Statute of Ontario for a public holiday, which these days were not; and that they must therefore be included in the 21 days here.

WILSON, J., delivered the judgment of the Court.

The Interpretation Act declares, in sec. 6, that "in construing this or any Act of the Legislature of Ontario, unless it be otherwise provided," &c. *Thirteenthly*: "The word 'holiday' shall include Sundays, New Year's Day, Good Friday, Easter Monday," &c.

In construing *this* Act, then—that is, the Interpretation Act—the word *holiday* does by the very language of the Act include Good Friday and Easter Monday, the days

in question. By including them it constitutes them holidays.

The case was not argued on this view or construction of the Act. Read in this manner,—the Interpretation Act has an independent and self-operating power, and does not require the passing of another Statute which contains the word holiday to call it into action.

The case was argued as if the Interpretation Act had no vitality until or unless another Act were passed to give it power, or on which it could operate.

I will consider the Act, then, as if that alone had been its purpose and effect. In such a case the Act would, until the passing of another Act which contained the expression *holiday*, have been passive and suspensive.

On the passing of another Act which contained the word *holiday*, and applied that word in a general and unqualified manner (and said nothing of holidays set apart), the two days in question, Good Friday and Easter Monday, would by virtue of the Interpretation Act thus called into action be included in the word ‘holiday,’ and would be constituted holidays; these days would be constituted holidays by virtue of the two Acts of the Legislature.

It is said that they have not been “set apart by any Act of the Legislature of Ontario for public holidays,” according to the language of the Controverted Elections Act of 1871: that saying holiday shall include these days, does not *set apart* these days as holidays.

They do, however, become holidays by force, effect, and enactment of the one statute or of the other, or of the two combined. The result is, that they are set apart by the mere force and effect of the Statute, whether the Statute declares they are or shall be set apart or not.

Setting apart can have no such technical meaning as murder, felony, fee simple, promissory note, or deed.

Days which are dealt with by legislation in a different manner from other days,—which are made holidays,—and upon which, but for the legislation, many acts which could

have been properly or lawfully done cannot by reason of the Legislation be now properly or lawfully done, may not inappropriately be spoken of as days which have been set apart.

We take no notice of the addition of the word *public* "*holiday*" in the Election Act, which is not to be found in the Interpretation Act. It does not in our opinion alter the construction of either Act in the least.

I have not touched upon the arguments of the learned Chief Justice of the Common Pleas on other views of the Statutes which he considered in disposing of the case when it was before him. I am well satisfied to take his opinion for my guide on these points. In my opinion the Interpretation Act does, independently of any other Act to operate upon, constitute Good Friday and Easter Monday holidays, or public holidays.

That Act has therefore *set apart* these days as public holidays, if the Interpretation Act have not alone done so; but if it is to be construed, as it was contended it should be, as operating upon and only when another Act was passed which used the word holiday in a general sense, then we are of opinion that when that other Act has been passed, as the Controverted Elections Act has been, the effect of the two Statutes, the operating and the one operated upon, is to set apart the two days in question as holidays or public holidays: that the expression *set apart* has no technical, special, or peculiar signification, and days dealt with by the Legislature as these two days have been may be said to be and are days set apart by Act of the Legislature.

I should not have thought there was so much doubt about this, if it had not been argued so strongly that the construction was so plainly and almost unquestionably the other way.

In our opinion the rule should be discharged with costs.

Rule discharged.

BONATHAN V. THE BOWMANVILLE FURNITURE MANUFACTURING COMPANY.

Infringement of patent—Public user before application—Patentee employed by defendants to make the invention—32-33 Vic. ch. 11, sec. 6. D.—Subject of a patent.

The plaintiff obtained a patent for a new and useful improvement on machines for bending wood for making chairs, and other purposes, and sued the defendants for infringement of it.

By the old process the wood to be bent for the back of a chair was placed on an iron strap, one end resting against a fixed shoulder upon the strap, the other confined by a movable shoulder which was tightened against the end of the wood by a wedge, in order to give the end pressure required to prevent the wood from breaking or splintering in bending. In the plaintiff's machine a screw was used in place of the wedge, and by it, but not by the wedge, the pressure could conveniently be regulated and adjusted during the bending. With the wedge, too, only a single curve or semi-circle for the back of the chair could be accomplished, while by the plaintiff's machine the two ends of the back piece could be bent down, so as to connect with the seat or body of the chair as side pieces. This also was effected by end pressure with the screw; and the side piece and back were thus formed out of one piece by continuous pressure, instead of from separate pieces.

It appeared that a machine had been used for many years in the United States which performed the same work as the plaintiff's, but it was too expensive. The plaintiff had been employed in defendants' factory in bending for about three months, and was asked by the foreman "to study up an invention or apparatus for bending chair stuff." He discovered the invention that same night, about the 1st of May, and next morning explained it at the factory. The machine was constructed there, defendants supplying the materials and the blacksmith's and carpenter's work, and was used there for chairs until about the 14th of July, when the plaintiff applied for a patent, many persons in defendants' employment being aware of its construction and operation. It appeared, also, that other persons in the factory as well as the plaintiff had been employed in trying to devise such an apparatus, and that when this was found successful the manager said he would patent it for the factory, to which the plaintiff did not then object. The plaintiff never informed defendants of his application for the patent, which issued in October following.

Held, that there had been a public user of the invention with the plaintiff's consent and allowance before he applied for the patent, so as to destroy his claim to it.

2. That the plaintiff having been employed by the defendants expressly to make or improve the machine, could not claim to be the inventor as against them.

Seemle, that the use of the screw to produce the end pressure could not be the subject of a patent, though the construction of the side and back in one piece might be.

ACTION for infringement of a patent right for the invention of certain new and useful improvements on machines in ordinary use for bending wood for making chairs, and other purposes, called and known as "The Economical Bending Apparatus."

Pleas: 1. Not guilty. 2. That the plaintiff was not the first and true inventor. 3. That the manufacture was not new. 4. That the patent was obtained by fraud or by a false representation. 5. That prior to the date of the patent the alleged invention was used by defendants at their manufactory at Bowmanville in bending wood for making chairs, and other purposes. 6. That prior to the patent the defendants had acquired the invention or discovery. Issue.

The cause was tried at the Spring Assizes for 1870, at Whitby, before Gwynne, J.

Upon the evidence, which is sufficiently stated in the judgment, the following questions were put to the jury : 1. Was, or not, a similar machine in public use in the United States for effecting a like purpose as this machine ? If there was, find for defendants.

2. Is, or not, the principle of this machine the same as the model made by Gage, and spoken of by him, and had the plaintiff knowledge of that model and seen it before the construction by him of this apparatus ? If yea, find for defendants.

3. Did the plaintiff construct this apparatus for the purpose of carrying out suggestions made to him by others in the employment of defendants, or had the plaintiff of his own suggestion and contrivance made any, and if any what, new and useful improvement of a machine previously in use, and wherein does the novelty of such improvement consist ; and was such improvement theretofore unknown in the Dominion, and also elsewhere out of the Dominion ?

4. Did defendants, in their business, use this apparatus for any, and if any what length of time before the patent, without any claim of the plaintiff to an exclusive interest in the alleged discovery.

Exceptions were taken by the counsel for both parties to the questions ; but the plaintiff's objections are now of no consequence, as he got the verdict, and the defendants' are of no consequence as they have not moved upon them.

The jury answered : 1. That a machine was in existence in the United States before the one claimed by the plaintiff,

but from its extreme price could bear but little resemblance to the plaintiff's.

2. We do not believe the principle of the machine made by Mr. Gage to have been at all similar to the plaintiff's, if ever there was one, from the fact that when the plaintiff was dismissed Gage was unable, according to his own evidence, for some time at least, to use said machine.

3. We do not believe that the plaintiff conducted his experiments on the suggestions of others, from the fact that if Mr. Johnson, Mr. Gage, and others had any suggestions to make they would certainly have made them to Mr. Medlin, his predecessor, who had made a machine which did not answer the desired end. We further consider that the manner of obtaining the second bend, the simplicity of the same, and its universal application to all purposes where a bend is required, fully entitle it to a patent.

4. We believe the defendants in their business for about five months used the plaintiff's apparatus, but we also believe that if there had not been a delay in getting the necessary papers the plaintiff would long before have asserted his claims.

The verdict was then rendered for the plaintiff, and 1s. damages.

In Easter Term, 1870, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave reserved, or why a new trial should not be granted, the verdict being contrary to law and evidence and the weight of evidence.

During the same term *C. S. Patterson* shewed cause. The plaintiff, it is said, was not entitled to patent this machine, even although an original invention of his own, because he used it in defendants' employment and service for several weeks before he made arrangements for taking out a patent, and for some time before he got the patent. But such user should not be turned against the plaintiff, for he used the machine, though for the defendants and in their service, with

locked doors. The defendants, too, spoke all the time of the invention as the plaintiff's property. The double bend machine is clearly a new and useful machine. Consol. Stat. C. ch. 34, now repealed by the Dominion Act, 32-33 Vic. ch. 11.

M. C. Cameron, Q.C., supported the rule. There is no new principle in the alleged invention. Wood had been bent by machines before the patent issued, and bending it in two ways at once does not alter the principle of or introduce any new principle in bending it only one way at a time : *Merrill v. Cousins*, 26 U. C. R. 49.

WILSON, J., delivered the judgment of the Court.

It is not always very easy to describe an invention or machine, from the evidence given at the trial, in a correct, plain, and intelligible manner.

By the aid of the machines produced at the trial, and by the explanations given of them, and from the memorandum furnished with the consent of parties, I believe the following statement is substantially correct, and may perhaps be understood (a).

Before the construction of the plaintiff's machine the defendants used in their factory, for giving a curve or bend

(a) The memorandum referred to was as follows:—The plaintiff's patent is for an apparatus for bending wood for making the backs of chairs and other similar purposes. When wood (after being steamed) is being bent, it is liable to break or splinter; and to prevent this the practice is to apply pressure to the end of the wood during the process of bending. In the factory of the defendants where the plaintiff worked, there was an apparatus by which, by means of a flexible iron strap, the piece of wood was bent round a pattern of the required shape, the end pressure being applied by a stop attached to the strap and adjusted by means of a wedge. This apparatus only bent the wood in one direction, as, *e.g.*, in the form of a semicircle. The plaintiff claimed as his improvement on this part of the apparatus the application of a screw in place of the wedge, and his mode of attaching the screw to the strap or bender; and he claimed that by means of the screw the pressure could be more exactly regulated, and more easily applied equally at every stage of the process of bending; and the plaintiff also claimed as his invention a mode of bending the wood in any other direction after it had received the first bend, by means of flexible straps and end pressure combined, and so attached as to work in combination with the bender by which the first bend was effected, together with cross straps and keys for confining the wood to the pattern upon which it was bent, so constructed as to be easily removable when the wood had to be taken away from the pattern.

to the backs of chairs, an iron band or strap along which the piece of wood to be bent was placed. One end of the wood rested against a fixed shoulder upon the strap; the other end of the wood was confined by a movable shoulder attached to the strap, which shoulder was tightened against the end of the wood by a wedge to give the necessary degree of what is called end pressure. This end pressure, vertical to the end of the wood, is applied to prevent breaking or splintering, to which the wood is liable in the process of bending.

Good wood will bend without end pressure, and without breaking or splintering, but by end pressure inferior woods can be bent quite as well as, if not better than, woods of higher quality without the pressure, and without the risk of breaking or splintering.

The defendants' machine bent the wood only in the form of a semi-circle.

The plaintiff's apparatus has a screw, which is attached to the strap in place of the movable shoulder and wedge of the defendants' machine. The screw he claims to be an improvement in this respect.

The inner face of the wood to be bent extends in the bending beyond the outer surface; the pressure at the end is to correct and regulate that.

If the wedge is driven too tight before the bending is begun it cannot be adjusted, or at any rate it cannot conveniently be adjusted, as it is necessary to do, while the bending is in progress; and if it be left slack at the beginning an unnecessary, and perhaps hurtful, extension of the wood takes place before the pressure operates sufficiently to check it.

The screw at the very beginning of the bending is applied with force at the end, and as the bending proceeds it is relaxed and adjusted, but kept up with an equal pressure throughout according to the extension which takes place.

The screw applies the pressure equally throughout the process of bending, and it is easily regulated. The wedge

does not apply the pressure equally throughout the process of bending, and it is not easily regulated.

The use of the screw, instead of the wedge, is a great improvement on the working of this machine.

The simple curve or bend was all that the defendants' machine accomplished. The plaintiff's machine, beside forming the curved back of the chair, effected the further work of bending down the two ends of the back piece so as to connect with the seat or body of the chair as side pieces. The second bending is effected by end pressure with the screw, as before stated.

Before the construction of this machine the defendants formed the side pieces from the ends of the curved back to the seat of the chair out of and by separate pieces of wood. By the plaintiff's machine the back and side pieces of the chair are formed out of a single piece of wood, and receive their two different bendings by one continuous process. The screw is a manifest advantage in working the apparatus; and the double bend, and the making the back and side pieces from one piece, and by a continuous action, are also a great benefit and of great utility.

The questions are, whether they are the subject of a patent, and whether the other issues have been proved.

The first inquiry which it is proper to make is, whether, in the words of the fifth plea, the alleged invention was prior to the date of the patent used by the defendants at their manufactory at Bowmanville in bending wood for making chairs and other purposes; for, if that be true, the plaintiff, although the inventor, and of a subject entitled to be patented, must nevertheless fail.

The evidence upon that point is to the effect that there was a machine which had been in use in the United States for many years before, which performed the same work which the plaintiff's machine does. It was too expensive. The defendants wanted to construct a cheaper machine. Several of the defendants' employees had been experimenting for that purpose, and had made machines, but they did not answer. The plaintiff, who had been at the bend-

ing part of the defendants' business for about three months, was then spoken to by Mr. Medlin, the defendants' foreman under Mr. Johnson, the manager, "to study up an invention or apparatus for bending chair stuff." The plaintiff then said, "I discovered the invention that same night, and the next morning I explained at the factory how I could do what was required. The invention discovered by me was afterwards used for making chairs which were sent to the provincial exhibition. I never got anything for the use of the machine. * * I was working with the apparatus after I made the invention for six or seven weeks for defendants before I applied for a patent, * * or before I spoke to Davy to make the plans."

Jamieson, the defendants' blacksmith, said, "plaintiff did not work at defendants' with locked doors." Davy, the defendants' carpenter, said, "while plaintiff was there he did all the bending that was done with his apparatus with locked doors. I told Johnson in June the plaintiff was going to patent it. He only said, 'what will it cost?'"

This is the evidence for the plaintiff and by him.

It further appeared for the plaintiff that the patent is dated 15th October, 1869: that as soon as the plaintiff got it he notified Mr. Johnson that some arrangement would have to be made with him for the use of the machine: that Johnson, in October, ordered him away: that the plaintiff never told Johnson that he intended to apply for a patent: that the defendants' blacksmith and carpenter did the work for the machine under the plaintiff's orders, and the materials for it were found by defendants; that when the plaintiff first explained it to the men of the factory, and it was found to answer, Mr. Johnson said he would patent it for the factory.

For the defence, Mr. Johnson said: "The plaintiff once said to me, Why did not the factory patent it? * * he made no claim to the apparatus or to the right to patent it; he never objected to our using it until he got his patent; we never asked his permission to use it, and he never used it except as the defendants' servant and in their employment * *

The apparatus was never used except when the plaintiff worked it * * I heard rumours of the plaintiff's intending to patent it. I don't think I ever thought of patenting it for the factory."

On this part of the case, it appears the invention or improvement was made in April or May, and was used in the factory by the plaintiff for six or seven weeks, as he says, before he spoke of taking out a patent. He never himself told Johnson, the manager, he was going to apply for a patent. After these six or seven weeks he continued to use the apparatus in the factory in doing defendants' work as usual till after he got the patent, which was some time in October. He then notified defendants they would have to make arrangements with him if they wanted to use the machine. The defendants turned the plaintiff away, and have continued to use the machine since then as it had been used before.

I say nothing of the plaintiff working with locked doors, for while one of his witnesses says he did so work, another says he did not. He says nothing on the point himself, nor did Mr. Johnson.

Is the above sufficient evidence of such a publication of the alleged invention or improvement, or such a user of it before the issuing of the patent, as to defeat the plaintiff's right to a patent?

The Dominion Act, 32-33 Vic. ch. 11, sec. 6, enacts, that any person who has been a resident of Canada for at least one year before his application, "having invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art machine, manufacture, or composition of matter not known or used by others before his invention or discovery thereof, or not being at the time of his application for a patent in public use or on sale in any of the provinces of the Dominion with the consent or allowance of the inventor or discoverer thereof, may, on a petition to that effect, obtain a patent," &c.

Was this machine in public use at the time of the appli-

cation for a patent, on or about the 14th July, 1869, in this province, with the consent or allowance of the plaintiff?

That is not the language of the fifth plea. It says nothing of the *public* use, nor does it say the user was with the consent or allowance of the plaintiff. No objection was taken that the plea did not raise the question intended to have been raised and actually tried, and an amendment would therefore be allowed now if it were necessary.

The plea denying novelty relates to the time of the application, and may perhaps cover this point: *Hyde v. Palmer*, 3 B. & S. 657; *The Househill Company v. Neilson*, Webster P. C. 713.

The cases to be referred to are the following: *Galloway v. Bleaden*, Webster's P. C. 521, 1 M. & G. 247. In 1833 the inventor left his invention for a week at the Admiralty. He showed it at his factory to all persons who wished to see it. In the same year he lodged a *caveat* at the patent office, but he took no steps to prevent the issuing of it to the plaintiff in 1835. It was held that the inventor had not lost his right to a patent.

In *Cornish v. Keene*, Webster's P. C. 44, the question left to the jury was whether the invention was or was not in public use and operation at the time the patent was granted. If the inventor lend the machine invented to another to test its qualities, and that other use it for five or six weeks in a public room, that is not such publicity as to deprive the inventor of his right to a patent. The room of the person experimenting was in a mill, and men were constantly going backward and forward to and from the room. The judge said the machine was not given to the other to make public, but to discover whether it was worth while to patent it: *Bentley v. Fleming*, 1 C. & K. 587.

In *Hartley v. Howland*, referred to in *Coryton* on Patents, 93, the defendant's predecessor in business used the invention for three months in his factory, where he employed seventy men. The jury found that was not a sufficient publication to defeat the patent.

In re Newall & al., 4 C. B. N. S. 269, it is said that a necessary and unavoidable disclosure of the invention to others, if made in the course of mere experiment, is not such a publication as will avoid the subsequent grant of a patent, though the same disclosure, if made in the course of a profitable use of an invention previously ascertained to be useful, would be a publication; but an experiment performed in the presence of others which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication so as to constitute a gift of the invention to the world.

The experiment was in laying down a telegraph wire in the Black Sea for the government under a contract. Experiments on dry land were found to be indecisive. The decisive experiment still remained to be made on a large scale and in deep water. The coincidence of the experiment with the actual immediate profit from it, if successful, was unavoidable.

In re Adamson's Patent, 6 DeG. M. & G. 420, a contractor for harbor works in the progress of the work invented an apparatus which greatly facilitated the work, and which could only be tested in a place accessible to the public. He used the apparatus four months in performing his contract work before he applied for a patent. It was held that such user amounted to a dedication to the public, and prevented him from obtaining a patent. No intention to apply for a patent was originally entertained.

In *Heath v. Smith*, 3 E. & B. 256, it was proved that before the date of the patent five persons had, independently, used the process patented, three of them without concealment, and all of them had publicly and generally sold for their own profit the article produced. Held, on such evidence, the plea of want of novelty and public user was proved, and the patent void.

Carpenter v. Smith, 9 M. & W. 300, shews that public use does not mean general use, but means a user as distinguished from a secret use; and the use of a lock in such a place as that the public might see it is a public use of it. S. C. in *Webster P. C.* 540.

In *Betts v. Neilson*, L. R. 3 Ch. App. 431, 436, the Lord Chancellor (Chelmsford) after examining the case of *Betts v. Menzies* in 1 E. & E. 990 and 1020, to ascertain what amounts to such public use as will invalidate a patent, says, "If the evidence establish that lead coated with tin by mechanical pressure, and capable of useful application, has upon any occasion been manufactured openly, not by way of experiment, but in the course of business, although not a single piece of the material was actually sold, I should hold that *Betts's* patent was invalidated."

On a consideration of these cases, it appears to us that the evidence given on the trial of this cause shews there was a public user of the subject of invention with the consent and allowance of the plaintiff before he made application for the patent.

He used it for six or seven weeks, he says, before he applied for the patent; but if he made the invention about the 1st of May, he used it for about ten weeks, for his application appears to have been about the 14th of July. Even then he continued to use it as before till he got his patent, a period of three months longer.

This user was by himself in and about the defendants' business, in which the plaintiff was engaged as a workman. The user, too, was in and about the manufacture of articles in the defendants' trade for sale, and which were largely sold, and a sample of the work was publicly exhibited at the provincial exhibition.

The user was not by way of experiment, for its successful working had been proved on the very first trial, but for actual and ordinary work, and for profit to the defendants, which the plaintiff permitted them to make.

The working of the apparatus does not appear to have been in secret. Many persons knew all about its construction and operation who were in defendants' employment, and they knew of its being used by the plaintiff for months in the defendants' service. The plaintiff did not, until after the issuing of the patent, prevent the defendants in any way whatever from having the free use of the apparatus as they pleased.

The defendants paid for all the time and materials expended in the discovery; and there is evidence that the plaintiff did not claim the right to a patent, but rather thought the defendants were entitled to it.

These facts, we think, destroy the plaintiff's claim to the benefit of a patent.

Why should the defendants be restricted now from the use of this apparatus to the same extent as they had the use of it before the patent?

The plaintiff having given them the use of it without check for nearly six months before he got his patent, and for about ten weeks before he ever applied for it, cannot restrain them from using it as they were before in the habit of using it: See *Cornish v. Keene*, Webster P. C. 511.

It is also a question whether the plaintiff was the inventor. The master cannot claim an invention made by a workman in his employment: *Barber v. Walduck*, cited in *Bloxam v. Elsee*, 1 C. & P. 568; *Hill v. Thompson*, 8 Taunt. 395.

But it may be different when the workman is employed for the express purpose of devising improvements: Per Bayley, J., in *Bloxam v. Elsee*, 1 C. & P. 568.

And in *Makepeace v. Jackson*, 4 Taunt. 770, it was held that the workman could not maintain trover against his master for a book, although it contained several processes for mixing colors of the plaintiff's own invention in the calico trade. The defendant furnished the book for entries of colors to be made in it, and the business could not be conducted without it. Heath, J., said: "It is clear from the evidence that the book was the property of the master, and though there might be inventions of the plaintiff in it, yet they were the property of the master." Chambre, J., said: "The master had a right to something besides the mere manual labor of the servant in mixing of the colors; and though the plaintiff invents them, yet they are to be used for his master's benefit, and he cannot carry on his trade without his book."

The plaintiff said he was asked by Medlin "to study up an invention or apparatus for bending chair stuff for a style of work that they could not bend with their old apparatus. I discovered the invention that night, and the next morning I explained at the factory how I could do what was required."

Jamieson said: "Mr. Medlin and many others in the factory tried to get up an apparatus for bending; plaintiff said he thought he could get up an improvement on the old apparatus; he said he had been studying the matter.

* * Have heard Mr. Johnson several times speak of getting up the apparatus for bending.

Stephen Wright, the defendants' witness, said he "was working at the factory when they were experimenting for improvements; all parties were working for the Company

* * I heard Johnson distinctly suggest the screw to plaintiff. All seemed interested more or less in getting up the apparatus."

Frederick Nelles, also a witness for defendants, said: "Have heard the plaintiff, Medlin, Gage, and Johnson speak about getting up the arrangement, and wondering how it would work when it was finished."

This evidence shews the plaintiff was employed purposely, as others in the factory had been, to try to get up an apparatus to do the work of the factory, and for the factory.

The defendants supplied all the materials, and their blacksmith and carpenter made the articles which the plaintiff required to use and experiment with.

And if it be, as the plaintiff himself says, that Johnson said, when he found the plaintiff's apparatus did the work required, "that he would patent it for the factory," and the plaintiff did not then say anything against it, but used it, as before stated, in and about the defendants' business for all the time he was in their employment, it confirms the evidence, and shews that all parties were employed to work out the improvement for the factory, and not for themselves.

It appears to me the law must be, that if a person be expressly engaged to invent or improve a machine or process of any kind for another, the invention or process is the property of the one for whom it was done. The skill and labor of the employee are then bargained for, for the production of a particular article, or the elimination of an idea to which practical effect is to be or can be given. The master would have no right to claim an article found by his servant, apprentice, or workman; but if the master expressly employed such person to make search for particular articles for him, I have no doubt the finding of any such articles by them would be for the benefit of the master.

The tenant who encloses land adjoining the land of his landlord is presumed to do so for the benefit of the landlord: *Doe dem. Lloyd v. Jones*, 15 M. & W. 580.

We think the plaintiff was not the inventor as against the defendants.

As to the invention itself, if it were necessary to decide it, I should doubt whether the use of a screw to regulate the end pressure, though certainly much better than the wedge, was an improvement the subject of a patent; *Harwood v. The Great Northern R. W. Co.*, 3 B. & S. Add.; Cas. 984 in H. L.; *Patent Bottle Envelope Co. v. Seymer*, 5 C. B. N. S. 164; *Ormson v. Clarke*, 13 C. B. N. S. 337, 14 C. B. N. S. 475; *Thompson v. James*, 32 Beav. 570; *Brook v. Aston*, 4 Jur. N. S. 279, 5 Jur. N. S. 1025; *Penn v. Bibby*, L. R. 2 Ch. App. 127; *Horton v. Mabon*, 16 C. B. N. S. 141.

The screw is, no doubt, a great improvement on the use of the wedge in the apparatus; but the screw has been in multitudes of trades, and in many different machines, and for many other purposes, used for adjusting the application of force or working machines; and the substitution of it for the wedge which did to some extent regulate the working of the apparatus, would not, I think, be the subject of a patent.

The construction of the side pieces out of the same piece which formed the back, and by a continuous process which

bent both the back and side pieces, appears to be plainly the subject of a patent. It is a great saving of time, and it is very easily and ingeniously accomplished. All *that* had been effected in the United States many years ago, but by a machine which it appears was too costly to introduce here: *Young v. Fernie*, 10 Jur. N. S. 926; *Cornish v. Keene*, Webster P. C. 506. The inexpensiveness of the machine would be the patentable claim here.

This case is not, however, decided on the sufficiency or insufficiency of the improvement or invention being the subject of a patent, but on the grounds that the plaintiff did not make the invention or improvement for himself, but for the defendants, by whom he was expressly employed to effect that special purpose; and that if the plaintiff could have claimed to have the patent granted to himself he had lost that right previous to his application for a patent by reason of his prior and public use of it in the course of his employment in the defendants' service, and for their profit as manufacturers.

The rule will therefore be absolute to enter a nonsuit.

Rule absolute.

HENRY HAYWARD V. ROBERT THACKER AND ALFRED HAYWARD.

Deed—Statement of date in pleading—Landlord and tenant—Distress—Insanity.

Action for taking goods. Second plea: avowry as bailiffs of W. H. for rent due by one W. B., the goods being on the demised premises. Second replication thereto: that said W. H., after the demise, by deed bearing date 30th October, 1869, granted to the plaintiff in fee the land mentioned in the plea, whereby the plaintiff became entitled to the rent from W. B., and W. H., at the said time when, &c., had no interest in the lands. *Held*, that the replication sufficiently shewed that the deed was made before the distress, for it must be assumed to have been delivered on the day it bore date.

Third replication: that on the 7th May, 1870, the tenant, by deed, released to the plaintiff all his estate in the land, and the landlord, in consideration thereof, released the tenant from the rent and covenants.

Held, good, for though the plaintiff would be estopped from denying the landlord's right to distrain, the release shewed that no rent was payable.

Third plea: Avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication: that before the demise one W. H. was seized in fee of the land, and, by deed dated 30th October, 1869, granted it to the plaintiff, who entered and took possession and held it as owner in fee at the time of the distress. It was objected that, consistently with this replication, A. H. might have held such an interest in the land as would enable him to make the lease prior and paramount to plaintiff's title. *Held*, replication clearly good.

The defendants rejoined to each of the above replications, that at the time of making the alleged deed W. H. was of unsound mind, and incapable of executing and understanding the same, as the plaintiff then well knew. *Held*, good, for that the defendant was entitled to set up such defence.

DECLARATION.—For that the defendants seized and took the plaintiff's goods, that is to say, three cows and two steers, and carried away the same, and disposed of them to their own use.

Second plea: That heretofore, to wit, before and at the said time when, &c., and during all the time while the rent hereinafter mentioned to be distrained for was accruing due, one Walter Balls held and enjoyed certain land of one William Hayward, being, &c., as tenant thereof to the said W. H. by virtue of a demise thereof theretofore made, at and under the yearly rent of \$220, payable on, &c., and because \$110 of the rent aforesaid for one half-year, ending on the 1st day of October, 1870, was due and in arrear from the said W. B. to the said W. H., the defendants, as and being the bailiffs of the said W. H., took the goods and chattels in the declaration mentioned, on the said land so demised as aforesaid, as a distress for the said rent, and sold the same.

Third plea: That one Walter Balls held and enjoyed certain land of the defendant Alfred Hayward, being, &c., as tenant thereof to the defendant A. H., by virtue of a demise thereof, &c. And it averred that the defendant A. H., in his own right, and the defendant Robert Thacker as his bailiff, took the goods on the said land as a distress for six months' rent in arrear under said demise, and sold the same.

Second replication to the defendants' second plea : That the said W. H. did, after the making of the demise in said plea mentioned, by deed bearing date 30th of October, 1869, for the consideration therein mentioned, grant unto the plaintiff in fee all the land mentioned in said plea, whereby the plaintiff became entitled to the rents and profits of the said land from the said W. B., and the said W. H., by reason of the premises, at the said time, when, &c., had not any estate or interest of or in the said lands, &c., or any part thereof.

Third replication to the second plea : That afterwards, to wit, on the 7th of May, 1870, the said W. B., by deed bearing date (a), released to the plaintiff all his estate and interest in the said land in said plea mentioned, and the said W. H., by deed bearing date (a), released the said W. B., in consideration thereof, from all the covenants and agreements to pay said rent, and from all other promises, covenants, and agreements made between them of and concerning the said lands.

Second replication to the third plea : That before the making of the alleged demise from the defendant A. H. to the said W. B., as in that plea is set forth, one William Hayward was seized in his demesne as of fee of and in the said lands and tenements in the said plea mentioned, and being so seized as aforesaid, by a certain indenture dated the 30th of October, 1869, for the considerations therein set forth, granted to the plaintiff all the lands and tenements in the said plea mentioned, and the plaintiff thereupon entered into the possession of the said lands, and has continued in the actual possession of the said lands from the date of the said indenture of grant ; and at the time of the said alleged distress in the said second plea mentioned, the plaintiff was in possession of the said lands as the owner thereof in fee simple.

Second rejoinder to the second replication to the second plea : That at the time of the making of the said alleged

deed, the said W. H. was of unsound mind, and thereby incapable of executing and understanding the same, as the plaintiff then well knew.

Second rejoinder to the third replication to the second plea: That the said W. H., at the time of the execution of the said alleged deed, was of unsound mind, and thereby incapable of executing and understanding the same, as the plaintiff then well knew.

Second rejoinder to the second replication to the third plea: That at the time of the making of the said alleged deed, the said W. H. was of unsound mind, and thereby incapable of executing and understanding the same, as the plaintiff then well knew.

Demurrer to each of the rejoinders, on the grounds—

1. That the rejoinder admits an executed conveyance from the said William Hayward to the plaintiff, and his alleged lunacy is not sufficient in law to avoid the same;
2. That it is not averred in the said plea that any advantage was taken of the said William Hayward;
3. That it is not competent to the defendants in this action to raise the question of the said William Hayward's insanity. And upon the further ground, as to the second rejoinder to the third replication to the second plea—
4. That it is not competent to defendants, in a suit between plaintiff and defendants, to impeach a transaction between the said William Hayward and a third person on the ground of said William Hayward's insanity. And on the further ground as to the rejoinder to the second replication to the third plea—
5. That it is not competent to defendants, not claiming through or under said William Hayward, to raise the question of his insanity.

Defendants joined in demurrer, and gave notice of exception to the second replication to the second plea, on the ground that it does not appear that the deed named in the second replication was made before the distress named in the said plea, and if not such replication is no answer to the said second plea.

And to the third replication to the second plea, on the

ground that the replication shewing that the plaintiff became the owner of the interest of the tenant in the land demised, the plaintiff is estopped from denying the right of the said William Hayward to distrain, and the release of the said Walter Balls from liability to pay the said rent is consistent with such liability of the plaintiff to pay said rent.

And to the second replication to the third plea, on the ground that it is consistent with everything stated in said replication that the said Alfred Hayward was possessed of such an interest in the said lands as would enable him to make such lease and demise as is set out in the third plea prior and paramount to the said alleged title of the plaintiff.

Anderson for the demurrer. The question as to when lunacy will form a defence to a contract is fully discussed in *Molton v. Camroux*, 2 Ex. 487, S. C. in Ex. Ch. 4 Ex. 17, and in *Beavan v. McDonnell*, 9 Ex. 309, where that case was adopted and explained. The distinction is drawn in each case between executed and executory contracts. If executory, lunacy, with the knowledge of the party contracted with, is an answer; but if the contract be executed this is by no means clear. In *Molton v. Camroux*, 9 Ex. 503, it is said by Pollock, C. B., delivering the judgment of the Court, "We are not disposed to lay down so general a proposition, as that all executed contracts *bonâ fide* entered into must be taken as valid, though one of the parties be of unsound mind. We think, however, that we may safely conclude, that when a person apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him." Now here there was no want of *bona fides*. [RICHARDS, C. J.: They will say, I suppose, that the plain-

tiff's knowledge of the lunacy shews want of *bona fides*.] No: two things are essential, knowledge of the lunacy, and that imposition has been practised. In *Dane v. Kirkwall*, 8 C. & P. 685, cited in *Molton v. Camroux*, lunacy was set up as a defence to an action for use and occupation of a house taken by defendant under a written agreement; and Patteson, J., told the jury, "It is not sufficient that it is shewn that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it," and that ruling was afterwards upheld by the Queen's Bench. But assuming the pleas to be sufficient, it may be contended that, whether knowledge of the lunacy is sufficient or not, it is sufficient to aver that the plaintiff knew it, and that the fact that it was a fair transaction may be the subject of a replication or matter of evidence. This, however, is not the case, for at most lunacy is only equivalent to a plea of fraud; and if so, the contract is voidable only, not void, and the defence here is not open to the defendant. If William Hayward, on coming to sound mind, could have avoided the contract, it does not follow that the defendant, though his bailiff, can take advantage of his lunacy. If the rejoinder to the second replication to the second plea be bad, the other rejoinders must *a fortiori* be bad, for no connection is shewn with William Hayward, whose insanity is set up.

S. Richards, Q. C., contra. Enough is shewn *prima facie* to avoid the contract on the ground of lunacy. If the contract was for the benefit of the lunatic or his estate they should shew it in answer: *Jacobs v. Richards*, 18 Beav. 300, 5 DeG. M. & G. 55; *Elliott v. Ince*, 3 Jur. N. S. 597. He contended also that the replications were bad, on the grounds mentioned in the exceptions taken.

MORRISON, J., delivered the judgment of the Court.

We think that the plaintiff is entitled to succeed on the exception taken to the second replication to the second plea.

That plea sets out that the distress was made for rent due on the 1st October, 1870, and the replication avers

that William Hayward, by deed bearing date the 30th October, 1869, granted the lands in question to the plaintiff, whereby he became entitled to the rents, &c. The objection taken is, that it does not appear that the deed was made before the distress. Now it is clearly laid down that if a deed is declared upon bearing such a date, but does not say when delivered, it is good, for every deed is supposed to be delivered and made on the day it bears date. The date of a deed is either express or implied. The express date is the very day and year on which the deed was made, and this is always intended where in pleading it is said *bearing date*. The other is the implied date, which is the delivery. I refer to *Bac. Ab. Obligations C.*, 2 Rep. 4, 6; Anonymous, 3 Salk. 120.

Then as to the third replication to the second plea. The replication avers that on the 7th of May, 1870, Balls, (the tenant), by deed released his estate, &c., in the land to the plaintiff, and that William Hayward (the landlord) by deed released his tenant, Balls, from all the covenants and agreements to pay the said rent, and from all other promises, &c., between them concerning the said lands. No doubt the plaintiff would be estopped from denying the right of Hayward to distrain unless the release to Balls, mentioned in the replication, took away his right of distress, and we think it did. It is true that the remedy of distress is given by the common law, independent of all stipulations upon the subject of rent between the parties; but to authorize a distress of the tenant's goods rent must be payable, and if the landlord by deed releases his tenant from the payment of all rent under his lease, he certainly cannot distrain. We therefore think that the plaintiff is entitled to succeed on the objections to the third replication.

We see nothing in the exceptions taken to the second replication to the third plea.

Then as to the demurrers to the several rejoinders setting up the unsoundness of mind of William Hayward. In our opinion the defendants are entitled to our judgment,

for we think the defendants can raise the question of William Hayward's insanity at the time he executed the deeds mentioned in the replication, and the validity of those deeds. A judgment in the defendants' favour would be only a judgment on this record and between those parties. As to the form of the rejoinders, they follow those given in *Bullen & Leake*, and we see no objection in point of form.

Judgment for defendants.

PARSONS V. CRABB.

Plea, set off—Replication, Statute of Limitations—Rejoinder, time allowed to expire by agreement in prior suit—Surrejoinder, violation of agreement—“Re-assigned”—Replication to set-off, plaintiff suing as executor.

Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for \$700, alleging non-payment; and on the common counts.

Sixth plea: set-off on two promissory notes made by the plaintiff, payable to F. & W., and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff.

Second replication: Statute of Limitations.

Equitable rejoinder, so far as the replication relates to the two notes set up in the plea: that on the 6th December, 1862, and before this suit, and before the notes were barred by the Statute, the plaintiff sued defendant in the Q. B. for the same causes of action now sued for: that defendant on the 4th March, 1863, pleaded by way of set-off therein the same notes, which exceeded plaintiff's claim, and which were over due but not then barred, and required the plaintiff to reply thereto: that the plaintiff did not reply and did nothing in the suit until October, 1868, when said notes had become barred by the Statute, and thereupon the plaintiff discontinued said suit, and commenced this action. And defendant avers that at the plaintiff's request he did not sign judgment of *non pros* in said suit, as he could and would have done; and it was then agreed that in consideration that he would not sign judgment the said two notes should be allowed against plaintiff's claim, and they were then mutually set-off and allowed against it: that defendant, relying on such request and agreement, took no further step in the suit, or to recover his set-off, but allowed it to be so set-off against the plaintiff's claim, which was thereby fully paid and satisfied. And defendant says that it is inequitable that the plaintiff should now be allowed to maintain this action, and defeat defendant's set-off by the Statute of Limitations.

Surrejoinder, on equitable grounds: that defendant waived and forfeited his rights under the alleged agreement by giving the plaintiff, before the discontinuance of the former and the commencement of this action, to wit on the 30th September, 1868, notice of his intention to proceed in the first action by entering judgment of *non pros* for want of a replication, and by accepting his costs of defence taxed on the plaintiff's rule to discontinue.

Held, upon demurrer: 1. That the agreement might have been pleaded as an accord and satisfaction to the declaration; but that defendant might nevertheless rely on the set-off, and set up the agreement in answer to the Statute.

2. That the rejoinder shewed a good answer to the replication.

Semble, per Wilson, J., that a defendant, though the plaintiff be nonsuited or have a verdict against him on the other issues, may have his set-off found and a verdict entered for it, for he has an independent right to judgment for his claim, which the plaintiff cannot defeat by a nonsuit.

Semble, that the rejoinder, without reference to the agreement, would have been sufficient if it had alleged that the present set-off was pleaded within a reasonable time for bringing an action for such set-off after the termination of the first suit, to wit within one year therefrom; for that the previous suit ended by discontinuance was a good answer to the Statute. But *Semble*, also, that without such averment it was bad, and that the dates appearing on the record could not be allowed to supply it.

Held, also, that the rejoinder was not a departure from the plea.

Held, also, that the surrejoinder was good, for the defendant had lost his right to the costs, if they could be recovered only by signing judgment which he had agreed not to sign: that the termination of the first action remitted both parties to their original rights, and defeated the accord and satisfaction between them; but that the defendant having broken the agreement, the remission related back only to such rights as they existed when the suit ended.

Semble, also, that in no way could the defendant by pleading avoid the replication and rely upon the equity of the Statute, for that the agreement and its waiver excluded that ground of defence.

Third replication, equitable: that the causes of action sued for accrued to the plaintiff as executor of one P., and not otherwise, for goods sold by plaintiff to defendant, which goods were assets of the estate, as will be the money sued for if recovered; and the plaintiff sues for the benefit of the estate only.

Held, that the replication was bad, for, among other reasons, the plaintiff on the transaction appearing would be personally liable.

Fourth replication, equitable: that the causes of action accrued to the plaintiff as in the third replication alleged, and that before this suit the plaintiff and his co-executors assigned all the testator's estate, including these causes of action, to H. and M., in trust for the creditors of the estate; and the plaintiff sues for the estate and as a trustee only.

Equitable rejoinder: alleging, among other things, that before this suit said H. and M., at the request of the plaintiff and all persons interested, reconveyed and reassigned all the testator's estate and effects so conveyed to them, including the causes of action in this suit. And defendant joins issue on the residue of said replication.

Held, on demurrer, that the word "re-assigned" implied that the property was assigned back to the assignors, and it would have been a breach of trust to assign to others; but that, there being no residue, there must be judgment for the plaintiff on demurrer as to that part of the rejoinder joining issue on the residue.

DECLARATION.—For that the defendant, by a certain agreement in writing bearing date the 14th of October,

1861, in consideration that the plaintiff would sell to the defendant a steam-engine and boiler, with the necessary shafting to drive the pump, promised the plaintiff to pay him \$700 for the same, as follows: \$450 by note at twelve months, and the balance in cash; and although the plaintiff delivered, and the defendant received the said engine and boiler, &c., yet defendant did not pay the plaintiff the said sum of \$450 by note at twelve months or otherwise, &c.

Second count—For goods sold and delivered, and on account stated.

Sixth plea: that the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount greater than the plaintiff's claim, upon two promissory notes, described, one for \$423.70, the other for \$423.21, both made by the plaintiff payable to Messrs. F. and W., and by them endorsed to the defendant, dated 6th of May, 1861, one payable five and the other seven months after date. Also for goods sold and delivered, work and materials, money lent, money paid, money received, interest, and on accounts stated. And the defendant claims a balance from the plaintiff.

Replications: 1. Issue on so much of the sixth plea as is confined to the common counts.

Second replication: That the alleged set-off did not accrue within six years before this suit.

Third replication: on equitable grounds; that the causes of action for which the plaintiff now sues accrued to the plaintiff as executor of the will of the late Benjamin Parsons, for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for money found to be due from the defendant to the plaintiff on accounts stated between them, and in his capacity as such executor, and not otherwise, which goods were assets of the estate of the late B. P. in the hands of the plaintiff after the death of the said testator, and the money now sued for will, if recovered herein, be also assets of the said estate; and this suit

is brought by the plaintiff for the benefit of the said estate, and not for his own individual benefit, and he has no interest therein.

Fourth replication, on equitable grounds: that the causes of action for which the plaintiff now sues accrued to him as in the last replication is alleged; and that before the commencement of this suit he, as one of the executors of the will of the said B. P., jointly with his co-executor and co-executrix thereof, made an assignment of all the estate and effects of the said testator in their hands to be administered, including the causes of action aforesaid, to John Haldan the younger and Thomas Morland, trustees, in trust for the benefit of the creditors of the said estate of the said B. P., which was duly assented to by them; and that he sues in this action, not for his own benefit, but for that of the said estate, and as a trustee only.

Rejoinder, on equitable grounds, to the second replication, in so far as such replication relates to the two promissory notes set up in said plea: that, on the 6th of December, 1862, and before the commencement of this suit, and long before the causes of set-off in the said sixth plea, or any or either of them, in so far as the same relate to the said two promissory notes, were barred by the Statute of Limitations as alleged in the said second replication, the now plaintiff issued a writ of summons out of Her Majesty's Court of Queen's Bench for Ontario (then Upper Canada), at Toronto, against the defendant, in an action for the same causes of action as in the declaration herein mentioned, as by the record and proceedings thereof remaining in the said Court appears; and the parties in this and the said former suit are the same parties:—that the said defendant, on the 4th of March, 1863, and within the period required by law for the purpose, pleaded by way of set-off (which set-off was greater than the said plaintiff's claim in the said former suit and in this suit) to the causes of action therein sued for and declared on, the very same identical promissory

notes set out and described in the said sixth plea of the defendant herein, such promissory notes having been long past due, but not barred by the Statute of Limitations, when said former action was commenced and said plea pleaded: that said defendant, by a notice in writing endorsed on the back of said plea, required the plaintiff to reply thereto within eight days after the service thereof, otherwise judgment: that said pleas and notice were duly filed and served on the plaintiff on the day last aforesaid, but that the plaintiff did not reply or in any way answer the said plea, but, on the contrary thereof, left the same wholly unanswered, and admitted the said plea to be good, true in fact, and good in law, and took no steps whatever in the said suit from the day last aforesaid until the month of October, 1868, when the said notes in ordinary course had become and were barred by the Statute of Limitations; and thereupon then the plaintiff discontinued the said original suit and commenced this action. And the defendant avers that the said plea of the defendant in the said former suit was not replied to or answered at any time, and proceedings in the said former suit were wholly suspended and stayed by the plaintiff, and judgment of *non pros* therein was not signed by the defendant for want of replication to his said plea—as the defendant might and could have done, according to the practice of said Court, and according to the law, and as he in fact intended to have done—at the special instance and request of the plaintiff and for his sole benefit; and it was thereupon then agreed by and between the plaintiff and defendant that, in consideration that the defendant would not sign judgment against the plaintiff on said plea of set-off, that the said two promissory notes should and would be so set off and allowed against the plaintiff's claim, and the same were thereupon then mutually set off and allowed against the plaintiff's claim: that at such special instance and request of the plaintiff, and for no other reason or cause, such proceedings in said former suit were and continued to be wholly stayed and suspended, and no proceedings

whatever therein were had from the said 4th of March, 1863 (when the right to recover on said notes was not barred by the Statute of Limitations), until the month of October, 1868, when said notes, but for the cause aforesaid, would in due course have been barred by the said Statute of Limitations. And the defendant relying on such special instance and request and on said agreement of the said plaintiff, and trusting and relying on the fact, as the fact really was, that the said plaintiff had admitted defendant's set-off against said claim of the plaintiff in said former suit to be correct, and to exceed in amount the plaintiff's said claim in said former suit, and to be rightly set off against the plaintiff's said claim, and that the plaintiff had therefore abandoned the said claim and said former suit, and did not intend to proceed nor would proceed any further therein, or for the recovery of said claims, took no steps or proceedings in the said former suit or for the recovery of the said set-off, as he might and could have done, and intended to do, but for such suspension and stay of proceedings at the instance and request of the plaintiff as aforesaid; but the defendant, by consent of the plaintiff, and at his special instance and request, allowed the same to be, and the same accordingly was set off against the plaintiff's said claim in the said former suit, being the same identical cause of action for which this action was brought, and the said claims were accordingly thereby set off and fully paid, satisfied and discharged. And the defendant says that it is now wholly unjust and inequitable that the plaintiff should be allowed to maintain this action, and defeat the defendant's said set-off thereto by pleading the Statute of Limitations, in so far as relates to the said two promissory notes and the amount thereof, when in truth and in fact such proceedings in the former suit for the same causes of action for which this action was commenced, and on the said set-off, in so far as relates to the two promissory notes pleaded thereto and hereto, were suspended and stayed as aforesaid at the special instance and request of the plaintiff, until after the right

to recover on the said notes became barred by the Statute of Limitations.

The rejoinder, on equitable grounds, to the third replication was, in substance, that the said B. P. was a merchant, and by his will directed that his executors and executrix should, after his death, carry on his business for the estate : that the plaintiff was the managing executor ; and in carrying on said business for the estate, and in obeying the will, the plaintiff, as such executor, and for the sole use and benefit of the said estate, and to carry on the business, and on the sole credit of the estate, purchased goods from the payees of said notes, for the price of which the said notes were given. And the plaintiff then stated to the payees that the goods were purchased for and would be paid out of the said estate, and that the estate only would be liable therefor, and the defendants obtained said notes, and the notes were endorsed to defendant by such payees, with a knowledge of said facts, and on the faith that the estate was liable for and that the same would be paid out of said estate by the plaintiff : that afterwards the defendant, relying on these representations of the plaintiff, became indebted to the plaintiff for the alleged causes of action in the declaration and in said third replication mentioned, on the faith that the said estate was liable for said notes, and that the same would, at maturity, be paid thereout by the plaintiff, and that said notes would form a subject matter of set-off against said alleged causes of action ; of all which the plaintiff, as acting executor, had notice, and to all which he assented.

Rejoinder, on equitable grounds, to the fourth replication : that the defendant repeats the allegations in the rejoinder to the said third replication of the plaintiff, and further says, that before the commencement of this suit the said John Haldan, the younger, and Thomas Morland named in the said replication, at the request of the plaintiff and his co-executor and co-executrix, and at the request and by and with the consent of the creditors of the said estate, and of all parties interested therein under and by virtue of the

said trusts or otherwise howsoever, reconveyed and reassigned all the said estate and effects of the said testator so conveyed to them as in the said replication mentioned, including the causes of action in the declaration mentioned. And the defendant joins issue on the residue of the said replication to the said plea.

Surrejoinder, taking issue on the 1st, 2nd, and 3rd rejoinders.

Second surrejoinder, on equitable grounds, to the first rejoinder (*i.e.*, the rejoinder to the second replication): that the defendant waived and forfeited his rights under the alleged agreement set out in the said rejoinder, by giving the plaintiff, before the discontinuance of the former action and the commencement of this suit, namely on the 30th of September last, notice in writing of his intention to proceed in the said first action by entering judgment of *non pros* against the plaintiff therein for want of a replication after the end of the term next ensuing such notice, and by accepting the costs of his defence of said action taxed to him on the plaintiff's rule to discontinue the same.

Demurrer to the first rejoinder (to the second replication), on the grounds: 1. The rejoinder is a departure from the plea, and if the defence now set up for the first time is good, it ought to have been pleaded to the declaration. 2. The facts set forth in it are not sufficient in law to constitute an equitable set-off. 3. Nor to prevent the operation of the Statute of Limitations; and are no answer to the plaintiff's second replication. 4. Although the said rejoinder alleges that the parties in the former action are the same parties as in the present action, it does not allege that the plaintiff sued in the former action in the same right as he now sues in, and no privity is shewn.

Demurrer to the second rejoinder (to the third replication), on the grounds: 1. The rejoinder does not set out sufficient facts and circumstances to shew that the legal effect and operation of the notes therein mentioned should be varied by parol. 2. The rejoinder shews no privity

between the plaintiff and defendant in regard to such parol variation.

Demurrer to the third rejoinder (to the fourth replication), on the grounds: 1. The rejoinder is bad for uncertainty and ambiguity; it professes at the commencement to be pleaded in answer to the whole of the fourth replication, and at the close joins issue on the residue thereof. 2. The rejoinder alleges a re-assignment of the estate and effects of the said late B. P., but does not state to whom the re-assignment was made, and if that construction is adopted which is most unfavourable to the pleader, then it is no answer to the replication which it is pleaded to, and presents an immaterial issue.

Demurrer to the second surrejoinder, on the grounds: 1. That it is no answer to the defendant's rejoinder, in this, that by the agreement set out in the said rejoinder the plaintiff was to pay the costs of the said former suit; that the only matters set off, as appears by the said agreement, were the respective claims of the plaintiff and defendant; and that with respect to the costs, each party stood on his rights, independent of the agreement. 2. That it does not allege that it was part of said agreement that each party should pay his own costs, or that the defendant should abandon his right to costs; and that being the agreement, the defendant had in Law and Equity the right to proceed for said costs without waiving or forfeiting said agreement. 3. That it admits the said rejoinder to be true in fact, and yet sets up no legal or equitable answer thereto. 4. For all that appears, no proceedings were had on said notice by the defendant.

The defendant joined in demurrer to the first, second, and third rejoinders; and the plaintiff joined in demurrer to the second surrejoinder.

In Michaelmas Term last the case was argued.

Spencer for the plaintiff. The rejoinder to the second replication of the Statute of Limitations to the set-off is a departure from the plea of set-off. The equitable matter of

the rejoinder to the replication should have been pleaded at once to the declaration, in place of the legal set-off which has been pleaded: *Hunter v. Gibbons*, 1 H. & N. 459; *Gulliver v. Gulliver*, 1 H. & N. 174; *Morrow v. Belcher*, 4 B. & C. 704; *Scarpellini v. Atcheson*, 7 Q. B. 864. Departure is a ground of objection on general demurrer; *Brine v. The Great Western Railway Co.*, 2 B. & S. 402; *Bartlett v. Wells*, 1 B. & S. 836. The rejoinder shews that the plea cannot be sustained, for it admits the claims are barred by the Statute of Limitations. The rejoinder to the third replication shews that the plaintiff gave the notes set off for goods which he bought to carry on as executor the business of the estate of his testator, and that defendant became the endorsee of these notes before he became indebted to the plaintiff. If the plaintiff is to be considered as suing as executor or as trustee for the estate, the notes given by him as aforesaid are a good and equitable set-off against him in that capacity. An executor cannot be charged as executor for goods sold and delivered to himself. The plaintiff was therefore personally liable on the notes he gave and now pleaded as a set-off: *Ashby v. Ashby*, 7 B. & C. 444; *Corner v. Shew*, 3 M. & W. 350; B. & L. Prec., 2nd Ed., 131. If the plaintiff be suing in reality for the estate, and not for himself, the notes pleaded as a set-off cannot in equity be set off: *Lambarde v. Older*, 17 Beav. 544, 17 Jur. 1110; *Smee v. Baines*, 29 Beav. 661, 7 Jur. N. S. 902; *Pratt v. Keith*, 33 L. J. Ch. 530, 10 Jur. N. S. 305. When the plaintiff sold the goods and made the contract in the declaration, he established a personal contract in his own favor and in his own right, and the defendant became liable to the plaintiff in like manner: *Shaw v. Ross*, 20 U. C. R. 262; *Thames Ironworks, &c. Co. v. The Royal Mail, &c. Co.*, 31 L. J. C. P. 169, 10 C. B. N. S. 375; *Reis v. The Scottish Equitable Life Assurance Co.*, 2 H. & N. 19. The fourth replication is similar to the third, but shewing that the plaintiff is suing as trustee instead of as executor. The rejoinder to it shews that the property assigned by the

plaintiff and his co-executors to the trustees was re-assigned by the trustees, but it does not state the re-assignment was to the plaintiff. The surrejoinder to the rejoinder to the second replication, which alleges that the agreement relied on by the defendant in his rejoinder was waived and abandoned by him by his forcing on the plaintiff to terminate that suit and to pay costs, must be a good answer to the agreement.

S. Richards, Q.C., contra. Defendant might have pleaded the subject of his rejoinder to the second replication to the declaration; but it is equally good against the replication, for that replication is now pleaded against good faith: *Brady v. Western Ins. Co.* 17 C. P. 597; *Supple v. Cann*, 9 Ir. C. L. R. 1. The surrejoinder to this rejoinder alleges a waiver by defendant of the agreement made between the parties; but the facts stated in it shew no waiver. They shew merely that by reason of the defendant's act, the notice served, the plaintiff had to pay the costs of that action; but that did not interfere with the agreement as to the set-off which had been made. The rejoinder to the third replication shews a valid defence, if the plaintiff is to be considered from his replication to be suing as executor. The rejoinder to the fourth replication removes the alleged trust relied on by the plaintiff in his replication; the re-assignment alleged in the rejoinder must be presumed to have been made to the plaintiff and his co-executors or to the plaintiff; that is the effect and meaning of the term *re-assignment*.

WILSON, J., delivered the judgment of the Court.

I have no doubt that the agreement which was made between the parties respecting the causes of action in the former suit, which are alleged to be the same as the causes of action in this suit, might have been pleaded as an accord and satisfaction to the present declaration. See *Callander v. Howard*, 10 C. B. 290, which contains a reference to the authorities on the subject.

That was and still is in reality the true defence, if that

defence can be maintained against the answer which has been given to it, to which I shall refer hereafter; and it is because the defendant has not relied upon it, he is answerable to some extent for the unusually protracted pleadings to which the statements and counter statements have run.

If the true ground of defence had been pleaded, it is quite possible that the defendant might still, in his anxiety to have every conceivable protection preserved to him, have nevertheless pleaded the sixth plea; or the plaintiff might perhaps have replied equitably to the accord and satisfaction the substance of his third replication.

The defendant would not, I presume, be allowed in equity to restrain the plaintiff from replying the Statute of Limitations when he had a complete defence at law by reason of the agreement which he contended should preclude the plaintiff from setting up the statute or from getting any benefit from it.

When the court of law can dispose of the whole case, an action will not be restrained by a court of equity: *Farebrother v. Welchman*, 3 Drew. 122. But when it cannot, equity will interfere: *Waterlow v. Bacon*, L. R. 2 Eq. 514.

The defendant's case, which he calls an equity, arises from the agreement; but that discloses a legal bar, so long as it is not repelled.

Still I am not satisfied that the defendant might not rely both on the accord and satisfaction as a legal bar, and on the set-off which was the subject of the accord, and in aid of it afterwards set up any case or equity he may have against the plaintiff's replication of the statute, if he thinks fit. It is a double defence, which may be necessary in case he fails in proving one of them.

As I think the defendant could have pleaded in this manner, even although he had pleaded accord and satisfaction, it can be no objection to his doing so when he has not pleaded the accord at all.

The question then is, whether he has in his rejoinder shewn a good answer, equitable or otherwise, to the second

replication of the Statute of Limitations; and we are of opinion he has in substance done so on the face of the rejoinder.

When the plaintiff brought his former action, and the defendant brought his counterclaim in against it, he substantially made himself an actor in the suit.

In England the set-off is a mere defence; it is, though twice as great as the plaintiff's demand, only a bar to the suit. The defendant recovers no part of the excess in that action, nor is he allowed to do more than to prove a sum equal to that which has been established against him. If there be an excess, he must sue for it in a separate action. In this country, ever since the 11 Geo. IV., ch. 5, the defendant is at liberty to prove and to recover the excess which he establishes against the plaintiff in the same action in which the set-off is pleaded.

The defendant is, therefore, in all cases where he has a larger cross claim than the one which is made against him, much more interested in the suit and in the result of it than he is in a similar case in England, and he may be said to be, as in fact he is, substantially a plaintiff.

It is said in *Wooddeson's Lectures*, Lecture 47, part 3, p. 85, when a set-off is pleaded "the parties are alternately plaintiff and defendant."

In *Marshall v. Hicks*, 10 Q. B. 15, Lord Denman, C. J., says: "The defendant who seeks to set off these payments, is in the same situation as if he were bringing an action for money paid in respect of them."

The defendant who pleads a set-off, though he give no evidence of it, cannot afterwards bring a separate action for it: *Eastmure v. Laws*, 5 Bing. N. C. 444. But he may, in England, bring an action for the excess of his demand beyond the plaintiff's: *Hennell v. Fairlamb*, 3 Esp. 104.

In this country, if by the plea the defendant claim or can recover the excess, he must or should be, on the same principle on which *Eastmure v. Laws* was decided, estopped from suing for or from setting off in a second action any part of the same demand.

In England it would seem not to be objectionable to plead a set-off and to bring a cross action for the same demand at the same time.

In *Baskerville v. Brown*, 2 Burr. 1229, the defendant was allowed to recover under his notice of set-off, though he had at the same sittings recovered a verdict in a cross action for the same demand,

In *Evans v. Prosser*, 3 T. R. 186, it was held not to be a good replication that the defendant had brought a cross action, which was then pending, for the same demand, and that the plaintiff had paid the amount now pleaded as a set-off into Court in that action.

In *Briscoe v. Hill*, 10 M. & W. 735, the plaintiff replied to a plea of set-off the payment of it into Court in another action, and that the same defendant took it out of Court, which was held a good replication in that respect, but it was defective in other particulars.

And in *Eyton v. Littledale*, 4 Ex. 159, Alderson, B., refers to the taking of the money out of Court as of consequence in creating a bar in the subsequent action. The remedy, in a case of this kind, when the party sues for the demand in one action and sets it off in another, it is said is by *auditá querelá* after the allowance or payment of it once, and to prevent its second recovery; or by application to the equitable interference of the Court.

I am disposed, too, to think that the defendant might, though the plaintiff were nonsuited or had a verdict found against him on the other issues, have his set-off found and a verdict entered for it. He has an independent right in the action to a judgment for his claim, or for the excess, apart from the plaintiff's demand altogether, and of which a nonsuit, either voluntarily or involuntarily taken, should not be able to deprive him.

In replevin for rent, if the plaintiff be nonsuited or a verdict be found against him, the defendant may by statute recover his damages notwithstanding the plaintiff's failure. Our statute of set-off seems to give to the defendant of necessity the like kind of right.

If a plaintiff could defeat a set-off by accepting a non-suit, it would be doing an injury to the defendant in that suit, and it might be doing him a further injury by destroying his claim altogether by means of the Statute of Limitations, which may have in the meantime accrued against him.

The result would be, that in every case in which a set-off was pleaded the defendant would have to bring a separate action for it, especially if the time were nearly complete against it, in order to save it from being defeated by the wilful or negligent nonsuit of the plaintiff. Or the result must be, that when an action has been terminated by a nonsuit or other reasons beyond the control of the defendant, he must be allowed a reasonable time after the termination of the suit within which to bring an action for the set-off which he had pleaded in and which was protected by that suit, or the like reasonable time within which to plead it as a set-off in the second action, if one be brought against him for the same demand.

A plaintiff who brings an action in an Inferior Court, which is removed by the defendant to a Superior Court, may, if his claim has been in the meantime affected by the statute, reply the commencement of his suit in time in the Inferior Court and the removal of it by the defendant, as an answer to a plea of the statute, for such a case is within the equity of its provisions: *Matthews v. Phillips*, 2 Salk. 424 ; 2 Saund. p. 63, in the notes.

So when the suit abated by the marriage of the plaintiff, she and her husband, in the new suit by them, were held entitled to reply to a plea of the statute the former suit and the ground of its abatement, and which was held to be a good replication: *Lord Middleton v. Forbes*, Willes, 259, note c.

So when the suit abates by the death of the plaintiff, that fact may be replied: *Kinsey v. Heyward*, 1 Ld. Raym. 432 ; or by the death of the defendant: *Sturgis v Darell*, 4 H. & N. 622, affirmed in Ex. Ch. 6 H. & N. 120. And although the second action is not brought for long after-

wards, by reason of there being no personal representative to the debtor's estate: *Curlewis v. Lord Mornington*, 7 E. & B. 283.

Amendments in a cause are allowed on the same principle, under the equity of the statute, to avoid the effect of it as a bar: *Cornish v. Hockin*, 1 E. & B. 602; *Clarke v. Smith*, 2 H. & N. 753.

I do not find any decided case that a nonsuit in a former action can be pleaded in the second suit as an answer to the statute either by the plaintiff or defendant, nor whether it can or cannot be done in the case of a discontinuance.

The statute of James, 21 Jac. I. ch. 16, and our own statute, Consol. Stat. U. C. ch. 78, sec. 10, mention only cases of arrest of judgment, or reversal of it on error, or outlawry; all other cases are allowed on what is called the equity of the statute. If relief is to be given only in those cases in which the party can be said not to have been in fault, no relief would be given on the arrest or reversal of the judgment, for these are cases in which the party may be said to have been in fault, nor would amendments be allowed, nor would an abatement of the suit by the marriage of the creditor be an answer, for that would be the termination of the suit by a voluntary act.

I do not see that a nonsuit—I do not say for every cause, but for a defect not more culpable than has occasioned the arrest or reversal of judgment—should not equally be held to be an excuse and sufficient answer to the statute; nor why a discontinuance occasioned by the like kind of excusable failure should not also be allowed as an answer. There is certainly a stronger reason, as I have already stated, for affording greater protection to a set-off pleaded in this Province against the operation of the statute, so long as that action is pending, than there is in England. For a second action here for the same demand would seem to be vexatious, because unnecessary, while in England, the excess not being affected by the pending suit, the second action could not be held to be vexatious.

I think the defendant, whatever the plaintiff may be

able to do in such a case, may to a second action rejoin the previous suit to a replication of the statute.

So also I think he may do it where the action has been ended by a discontinuance, for that is a proceeding which the plaintiff is at liberty to take "without the leave of the defendant."

A Court of Equity may remove the legal bar arising from lapse of time, as it may any other legal advantage, if it be sought to use it unconscientiously : *Bond v. Hopkins*, 1 Sch. & Lef. 412, 430.

So while a creditor is prevented from suing by reason of the terms of a deed of composition, he is not barred by the lapse of time which has run against him since the making of the deed, if he have to sue the debtor by reason of his default to pay : *O'Brien v. Osborn*, 16 Jur. 960, 10 Hare 92; *Iven v. Elwes*, 1 Jur. N. S. 6, 3 Drew. 25.

So where a creditor enters into an engagement for payment of his debt at a particular time, he is, when that engagement is broken by the debtor, remitted to his original right to sue for his debt as he might originally have done, and no special replication to a plea of the statute is required : *Irving v. Veitch*, 3 M. & W. 90. It is said, however, that equity will not aid a party who by reason of a suit in equity has not prosecuted his rights at law, if he were not hindered by the Court from proceeding at law : *Craddock v. Marsh*, 1 Ch. Rep. 205; *Hurdret v. Calladon*, 1 Ch. Rep. 214; *Lake v. Hayes*, 1 Atk. 281, and *Anon.* 1 Vern. 73, in the notes.

I should have held, therefore, that the rejoinder afforded the substance of a good answer to the replication at law, without reference to the agreement to which it alludes, (excluding for the present the answer which the plaintiff has made to it by his surrejoinder, which has yet to be considered,) although perhaps not a perfectly good answer, because of the omission to state that the present set-off was pleaded within a reasonable time for bringing an action after the termination of the former suit; but I will refer to that afterwards.

As to the objection that the rejoinder is a departure, it is not, I think, maintainable. It is not a departure; it is in affirmance of the plea. It sets up no new defence, but it advances reasons why it should be allowed to prevail against the replication, and why the defendant should recover his set-off notwithstanding the strict but inequitable bar of the replication. I may refer also to the cases of *Stewart v. The Great Western R. W. Co.*, 11 Jur. N. S. 627; and *Supple v. Cann*, 9 Ir. C. L. Rep. 1.

The effect of the surrejoinder has now to be considered. It states that the agreement mentioned in the rejoinder was waived and forfeited by the defendant, by reason of his having given a notice to the plaintiff of his intention to proceed in the former action by entering a judgment of *non pros* for want of a replication, and by reason of his having accepted the costs of that action on the rule to discontinue.

The defendant is not, we think, entitled to the benefit of his rejoinder, based upon the agreement which it contains, or upon the other parts of it, assuming them to be a sufficient answer of themselves, independently of the agreement, if the surrejoinder be good in point of law.

We think it does shew an act on the part of the defendant which was a proceeding taken contrary to the agreement. He contends he was entitled so to proceed in order to recover his costs; but his engagement was not to sign judgment of *non pros* for want of a replication, and when he served this notice that he would sign judgment unless the plaintiff did reply, he compelled the plaintiff to reply or to have a judgment signed against him for not replying, or to discontinue upon the condition of paying costs. The latter was the course adopted, with the consent, we must assume, of the defendant, who received the costs of it. If the defendant could not recover his costs but by the means of a judgment or of forcing on the suit by a replication, and he had agreed to do neither the one nor the other, he had necessarily deprived himself of all right to costs; for "it is a vain thing to imagine a right without a

remedy, for want of right and want of remedy are reciprocal": *Ashby v. White*, 2 *Ld. Raym.* 953.

It may be said the plaintiff was not compelled to prosecute his suit or to discontinue it, for the agreement which the rejoinder sets up was as much a protection to him against such an adverse proceeding of the defendant, as it was a hindrance to the defendant to take it. That no doubt is so, but it was not so considered at the time. The defendant plainly wanted the costs of the suit, and it does not very well lie with him to say now that the plaintiff should not have submitted to the hostile notice which was served. Both parties assented to the validity of the notice given, and to the result which was accomplished by it, although no doubt the defendant never desired to prejudice himself in the manner or to the extent to which that proceeding has since been used against him.

The question then is, whether the termination of the former action remitted both parties to their original rights, and defeated the accord and satisfaction which had been entered into between the parties. I think it did. The case of *Turner v. Browne*, 3 C. B. 157, is very applicable.

The further enquiry is, to what time is the remission of the parties to their original rights to have relation—to the time of the termination of that suit, or to the time at which it was begun? If the former period, the statutable time is complete against the defendant; if the latter it is not.

The former action was commenced on the 6th of December, 1862, and was ended on or shortly after the 30th of September, 1868. On the 10th of December, 1867, the promissory notes set off were both barred by the Statute. The present action was begun on the 9th of October, 1868,

If the agreement had been broken by the plaintiff, as in *Turner v. Browne*, 3 C. B. 157, and *Irving v. Veitch*, 3 M. & W. 90, or if the time had expired without the fault of the defendant, as in *O'Brien v. Osborn*, 16 Jur. 960, and in the other cases before referred to, the defendant would be remitted to his rights as they were when the agreement was

entered into. But when he has himself broken it, and has brought about all the difficulty by his own acts, I do not feel satisfied that any other rule can be applied to him or to his rights than to leave them just as they were when the suit was terminated.

That suggests the further enquiry, whether, if all about the agreement in the rejoinder be struck out, there is sufficient matter remaining to constitute a defence, equitable or legal, to the replication.

What would remain would be the pendency for many years of an action between the parties respecting the same demands which are now in question : that during such time the period of six years had become complete against the set-off, but not against the plaintiff's demand : that by the discontinuance of that suit the plaintiff had the right again to sue for his demand, which was not barred by lapse of time; and that he had sued for it, and that the defendant had lost the benefit of his counter claim because it had become barred by the Statute since the protection of the former suit had been taken away.

These facts, I think, do not alone constitute a sufficient rejoinder.

If the former suit did protect and preserve the set-off while it was pending, and if the defendant would have had a reasonable time after its determination within which to bring an action for the recovery of his claim—and both propositions, I think, are in his favor—he would in such an action as a plaintiff have been obliged to reply to a plea of the statute, not only these facts, but the further essential fact that he had brought his action within a reasonable time, to wit, within one year, after the end of the former action, in order to bring his case within the equity of the statute. The right which he would have had as a plaintiff for the protection of his former set-off, he must have and would have had also as a defendant for its protection. But from the want of the material allegation before referred to, the rejoinder does not, apart from the agreement contained in it, constitute a proper answer to the replication.

It may be said that the dates appearing on the record—that the former action was ended on or shortly after the 30th of September, 1868, and the present action was begun on the 9th of October of the same year, and the present set-off was again pleaded on the 15th of March, 1869—will be so taken notice of by the Court, that it will be seen the new action was brought and the set-off again pleaded within a year from the termination of the former suit, and so the set-off was pleaded within such reasonable time as to give it the necessary protection of the statute.

I think the days stated need not have been or be proved as laid, and that the proper averment of fact cannot be dispensed with. The pleading is framed with a wholly different intent. It is plain that the defendant has based his case entirely upon the accord and satisfaction which it discloses, and upon which he should have relied in a plea to the declaration, and not upon any protection which he was entitled to under the statute.

In no way of considering his present rejoinder and the surrejoinder to it, do I see that he can protect himself. And I fear that in no way of considering the facts of the case can the defendant by pleading avoid the effect of his waiver of the agreement, or exclude the agreement from consideration, and urge the mere equity of the statute in his favor. The agreement and its waiver change or exclude that ground of defence.

If a defence cannot be pleaded, it may be the defendant can get relief on motion to set aside the rule to discontinue and the judgment entered upon it, by reason of its being a proceeding operating against the intent of the parties, or of the defendant at all events, and because it is used unconscientiously by the plaintiff against the defendant in this action.

At present, in our opinion, there must be judgment on the demurrer to the surrejoinder for the plaintiff.

The next line of pleadings is the rejoinder to the third replication, and the demurrer to such rejoinder.

The replication, on equitable grounds, alleges that the

causes of action in the declaration contained accrued to him as executor of the late Benjamin Parsons, and not otherwise, and therefore the plea of set-off of the plaintiff's individual liabilities ought not to be allowed in this action.

The rejoinder states that the notes so pleaded as a set-off were given by the plaintiff in his capacity as such executor for goods he bought to carry on the business of the testator, and therefore, even if this action be considered as brought by the plaintiff as executor, the plea of set-off is still an available defence.

The plaintiff says that the rejoinder is no answer in law.

If both debts are legal, there is a good set-off. If both be connected with the affairs of the estate of Benjamin Parsons, there is still a good set-off.

If a plaintiff bring an action in his own name in respect of a demand which is part of the assets of the estate he represents as executor, and a legal set-off is pleaded to the demand, it may be quite right that he should be allowed to reply to the fact of his suing in fact for the benefit of the estate, and not for his own benefit; for the allowance of a set-off against him would probably be deemed a *devastavit*.

There seems no reason why the executor might not so reply, just as an insolvent or bankrupt may to a plea of bankruptcy or insolvency that he is suing as trustee for one to whom he had assigned the claim before his bankruptcy or insolvency to the knowledge of the defendant; nor is there any reason why a plaintiff in a proper case—as in *Kingsmill v. The Bank of Upper Canada*, 13 C. P. 600, or in other analogous cases—should not reply to defeat a set-off pleaded to the demand sued for, as well as a defendant plead a set-off equitably due to him to defeat the demand: *Cochrane v. Green*, 9 C. B. N. S. 448.

The rule in equity, in a case like the present, where an executor deals with the testator's effects in carrying on a trade, or for any other purpose, or in any other way than that which is within the strict line of his duty, is that the

executor is personally liable, and the estate is not liable at all: *In re Leeds Banking Co.*, L. R. 1 Ch. App. 231; *Labouchere v. Tupper*, 11 Moo. P. C 198.

I am not clear that the plaintiff can call 'in aid the equity which he sets up on behalf of the estate; but it is quite clear he cannot defend himself from a personal liability on such a transaction.

It seems to me very doubtful how far he can submit a question of trading with the funds of the estate to this Court; a matter which would require a special investigation in equity before it could be determined what was or what was not an asset to be administered, and when it does not appear that there were not profits made by the dealings of the plaintiff as executor, in which case this set-off would be allowed against the assets of the estate or against the plaintiff personally. The replication attempts to exclude the defendant absolutely at law, although there are circumstances which would entitle him to rank on the estate in equity, and which the plaintiff does not exclude; and besides, it is a question to be tried whether the plaintiff was at the commencement of the suit and still is indebted to the defendant "in an amount greater than the plaintiff's claim"; and we should, if we gave effect to the replication as now framed, be depriving the defendant of the opportunity of getting a judgment against the plaintiff in his private capacity for the amount which his set-off may be found to exceed the plaintiff's demand, and for which excess equity would, equally with a Court of law, hold the plaintiff to be personally liable, and against which he can have no relief as of right by charging it against the estate.

For these reasons we think the third replication is bad and insufficient.

The next pleading in question is the fourth replication and the demurrer to it. The replication states that the plaintiff and his co-executors assigned the estate and effects of the testator, including the causes of action sued for, to trustees, and that he now sues on behalf of the trustees.

The rejoinder states, in addition to the special matters in the preceding rejoinder, that the trustees re-assigned all the estate and effects, including the causes of action in the declaration mentioned, without saying to whom the re-assignment was made.

It is said "*re-assigned*" does not shew, in the absence of express averment, that the property assigned came back to the same person who gave it. I think it must be assumed that it was to the same parties. "Re-" represents a backward action. The pleading should be read so as to support it, and not to defeat it. If it be that the trustees have assigned to any other person or persons than to the plaintiff and his co-executors, then it does not appear on these pleadings that the plaintiff is suing for the present trustees. But as trustees, as a rule, cannot transfer their trust without express authority to do so, we are only assuming that they have not violated their trust by delegating it to others, in holding that the re-assignment which they made was a transfer back again to the persons who made it.

It is then objected that the rejoinder is ambiguous, because it professes at the commencement to be pleaded to the whole replication, and at the close it joins issue on the residue of it. The joinder of issue to the residue is no doubt insensible and idle. There is no residue. There may be judgment against that portion of the rejoinder, not the whole of it. If it were meant as a joinder of issue on the replication, so that there should be an issue of fact on it as well as the special rejoinder, it should be amended by striking out the word *residue*.

The rejoinder is sufficient in other respects, and judgment on the demurrer to the special rejoinder should be for the defendant, and for the plaintiff on that part of it which is an answer to the *residue* of the replication.

The result is, that there is judgment for the plaintiff on the demurrer of the defendant to the surrejoinder of the plaintiff to the rejoinder to the second replication; and for the plaintiff on that part of the rejoinder to the fourth

replication which takes issue on the *residue* of the said replication; and judgment for the defendant on all the other issues in law.

Judgment accordingly. (a)

IN THE MATTER OF HARRIET LOUISA ALLEN, A MARRIED WOMAN, OF MAUDE ALLEN, FREDERICK ALLEN, AND ETHEL ALLEN, INFANTS RESPECTIVELY UNDER THE AGE OF TWELVE YEARS; AND OF THE STATUTE CONSOL. STAT. U. C. CH. 74;

AND IN THE CASE OF REGINA V. ALLEN.

Infants under 12—Custody of—C. S. U. C. ch. 74—Appeal from Judge's order—Practice—Ex parte order—Facts insufficiently stated—Process of contempt—Clerk of the process.

A married woman living apart from her husband petitioned, under C. S. U. C. ch. 74, sec. 8, for the custody of her children under the age of 12. The grounds stated were, that she was then living apart from her husband, having been about six weeks before forbidden his house without any sufficient reason: that one of the children had since the separation been living with her with his consent, but he had withheld the others: that if for no other reason than that he was Mayor of the Town, and so more or less occupied with public duties, he was quite incompetent to take proper care of them, and she was informed that they were neglected, and the health of the youngest, being delicate, was endangered, &c.; and that she had delayed making the application, being induced to believe he would give up the other two. Upon this petition, verified by affidavits, an *ex parte* order was made on the 3rd of July, 1860, for the delivery of the children to the petitioner, to be kept by her within the jurisdiction, and sent from time to time to see their father, if desired; the question of the amount to be allowed by him for their maintenance to be reserved for a future application. It was urged to the Judge, though not stated in the affidavits, as a reason for making the order *ex parte*, that if notice of the application were given the children would be removed beyond the jurisdiction, as they could be immediately, the father living upon the frontier.

On the 12th of July, the father applied to the same Judge to rescind this order, as having been made improvidently, and without notice to him, and because the facts had been misrepresented. In support of this application it was shewn that in an action against him, brought by his wife's father, tried in May previous, she, as a witness, charged him with a crime, in consequence of which they separated, upon an arrangement that she should take with her one child, and see the others daily, he providing for her support. It was also alleged that the wife had used very improper language towards him, and had absented herself from home to the neglect of her children; and the statements in the petition as to the health of the children, and his neglect of them were denied.

(a) See Crabb v. Parsons, 18 Grant 674.

This summons was answered by numerous affidavits, wholly denying his charges, asserting her good conduct and character, and alleging against him cruel treatment and neglect of his wife, and injurious teaching of the children. A deed of separation was also filed, executed between them in 1852, which gave her the sole control of the children, then or thereafter to be born, in consequence of the cause of separation being such as in England would call from the Ecclesiastical Courts for a divorce *a mensâ et thoro*, and would justify their removal from him, which causes it was said in the deed to be unnecessary to specify.

The husband filed additional affidavits supporting his original case, and recriminating against his wife; and on the 20th of August the summons was discharged, leaving the original order to stand.

Held, Morrison, J., dissenting 1. That an appeal would lie to the Court from the Judge's order.

The cases in, and the principles upon which, an appeal is or is not allowed reviewed by Wilson. J.

2. That admitting the right to make an *ex parte* order in case of necessity, no sufficient ground was shewn for it here.

3. That the facts had not been properly stated in the first application, the real reason for the applicant leaving her husband's house and the arrangement then made between them having been withheld.

4. That the subsequent hearing of both sides upon the merits did not preclude him from taking advantage of these objections against the original order, which was therefore set aside.

5. *Per Wilson. J.*, that upon the whole case enough was not shewn to warrant an order for depriving the father of the custody of the children; and the deed of 1852 could not be given effect to as regarded children born by a cohabitation renewed after it and continued ever since.

In reply to the affidavits filed by the wife in shewing cause to the summons to rescind the first order, the husband desired to file affidavits in answer to the recriminatory charges which had been made on her part; but the learned Judge refused this. *Per Wilson, J.*, this was a matter within his discretion.

The rule to rescind the summons was drawn up "upon reading the affidavits and papers filed," not specifying that the papers used in Chambers were refiled, or that they were brought up by leave of the Court.

Held, that, though it is better to specify this, the objection could not prevail here, for the rule shewed plainly that it was by way of appeal from proceedings in Chambers, the affidavits and papers filed there were expressly mentioned, and they were in fact refiled, as appeared by an affidavit filed in shewing cause,

Held, also, that if the objection had prevailed the rule might have been at once amended.

Held, also, that in such cases the leave of the Court to use the papers in Chambers is unnecessary.

A writ of attachment for contempt in not obeying the original order, was by order of the Judge issued from the Court of Q. B.; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it he could not be heard; but *Held*, that he might nevertheless defend himself by objections to the process, if irregular.

Held, also, that it was unnecessary to make the order for delivery of the children a rule of Court before bringing the father into contempt, but that the proceedings should have been moved into and adopted by the Court before an attachment could issue from it; and that this attachment therefore was irregular.

Per Wilson, J.—The Judge could by his own order have attached the party.

Held, also, that such attachment was properly signed and sealed by the Clerk of the Process, and issued by the Clerk of the Crown.

IN the first of these cases a rule was granted in Michaelmas Term, 1869, on the application of William Cox Allen, calling on Harriet Louisa Allen, his wife, to shew cause why the order of the Honourable Mr. Justice Morrison, made in this matter on the 3rd of July, 1869, should not be set aside or rescinded, on the grounds: (1) That the said order should not have been made upon the affidavits and papers filed on the application for the same, and that the said order was improvidently made; (2) that the facts were misrepresented on such application and concealed; (3) that the said William Cox Allen was, and is entitled to the custody of the children named in the said order; (4) and that the same was made without notice to the said William Cox Allen. And why the order of the same Judge, made in this matter on the 20th August, 1869, should not be set aside or rescinded, on the ground (5) that the said order should not have been made, and that the summons referred to in the last mentioned order should have been made absolute on the grounds stated therein.

And why the order of the same Judge, made in this matter on the 4th of September, 1869, and all proceedings thereunder, should not be set aside or rescinded, on the ground (6) that the last mentioned order should not have been made upon the facts shewn on the application for the same; (7) that it was not shewn that the order made on the 3rd of July, and mentioned in the order of the 4th of September, had not been complied with, or that the same had been wilfully disobeyed; (8) or that the said order of the 3rd of July had been made a rule of Court; (9) and on the ground that the said learned Judge who made the order had no power or authority to make the same; and on grounds disclosed in affidavits and papers filed.

IN the second case a rule was also granted on the application of William Cox Allen in the same term, on his wife, to shew cause why the writ or writs of attachment issued on the 4th of September, 1869, against him, should not be set aside, on the following, amongst other grounds:

1. That it was not shewn the said William Cox Allen had been guilty of any trespasses or contempts.

2. That the learned Judge, who ordered the said writ or writs to issue, had no power or authority to make such order.

3. That the said writ or writs were not authorized by the order on which the same was or were issued, nor by any order or rule whatever.

4. That a writ of attachment cannot and should not be issued to enforce obedience to, or for or upon disobedience of a Judge's order, until the same has been made a rule of Court.

5. That the writ or writs so issued are under the hand and seal of the Clerk of the Process, and are not under the seal of this Honourable Court. And on grounds disclosed in affidavits and papers filed.

In the first case, the first order, or the one of the 3rd of July, 1869, was made on the following affidavits and proceedings: 1st. The petition of Harriet Louisa Allen, verified by her affidavit, which stated that she was the wife of William Cox Allen: that she was then living apart from him, having been about six weeks before then forbidden by him from his house without any sufficient reason: that she had three children by her said marriage—Maude, aged eight years, Frederick, six years, and Ethel, three years: that Maude had since the separation been by consent of the petitioner's husband living with the petitioner, but he had hitherto withheld the other two children from her, and still kept them from her: that if for no other reason than that he was Mayor of the town of Cornwall, and so more or less occupied with public duties, he was quite incompetent and unfit to take the proper and necessary care of the said children and the petitioner was informed and believed they were subjected to various kinds of neglect, and the younger child being delicate and sickly, and petitioner having no access to her, her health was greatly endangered: that, induced to believe he would give up the two children, she delayed making the application for the aid of the

Court ; but she had reason to fear he had no intention to give her the children, and her only hope of getting them was by aid of the Court : that she had been informed and believed he had intended to take Maude away from her : that the children were all tenderly attached to the petitioner, and their most anxious wish and prayer was to be allowed to come to her and remain with her, and she was while deprived of them, and under fear of losing the one with her, compelled to endure the utmost distress of mind and misery : that her husband paid for the petitioner's board, and the board of the child with her, at the rate of £60 per annum.

She therefore prayed that an order might be made by a Judge of the Court of Queen's Bench upon her husband, for the delivery up of the children Frederick and Ethel to her, to remain together with her eldest child in her care and custody, she being willing and intending to keep them within the jurisdiction of this Court, so as to allow her husband to have such access to them as might be directed ; and that her husband should be ordered to pay for the maintenance of the children besides her own maintenance ; and that such further and other relief might be granted to her as should be necessary and proper.

2ndly. The affidavit of the sister of the petitioner. She stated that the facts in the petition were true : that on the 6th of May, 1869, the petitioner came to her father's house in Cornwall, where the deponent was then staying, saying she had been driven out of her house by her husband, and that she remained at her father's that day and night : that on that or the following day, her husband sent a message to her to go to a boarding-house, and he would pay for her board and that of her daughter Maude : that she went to the boarding-house with her daughter, and they had remained there ; that the petitioner had been living in the constant hope her other two children might be sent to her, and she had suffered every distress of mind from not having them ; that for some time back the youngest child had not been to see her mother, and the deponent had

understood from the children that their father had forbidden them from seeing their mother, and had whipped the little boy for going to his mother in spite of him; that she believed the said Allen meditated taking away Maude from her mother; and that the petitioner, who was weak and low in mind and body, was then living in hourly dread of her husband taking away Maude forcibly from her, and that the deponent would not answer for the consequences to the petitioner's life if any such calamity were to happen to her.

3rdly. The affidavit of Caroline Jolly. She stated that she was living as a servant at the house of Dr. Allen on the 6th of May, 1869, and that she heard him order his wife out of the house, and that he then turned her out, and she had since, as deponent believed, been living at a boarding-house in Cornwall.

The order of the 3rd of July, 1869, was thereupon made. It was drawn up on reading the proceedings referred to.

It proceeded as follows:—"I do order that William Cox Allen, of the town of Cornwall, named in the said petition, do, upon service of a copy of this order upon him, forthwith deliver up to the said Harriet Louisa Allen, or to such person as she shall appoint on her behalf, the said Frederick Allen and Ethel Allen, to be and remain, together with the said Maude Allen (now with her), in the care and custody of the said Harriet Louisa Allen until they respectively attain the age of twelve years, to be kept by her, the said Harriet Louisa Allen, at all times within the jurisdiction of this Honorable Court, and from time to time to send the said children, if able to go, to visit and see the said William Cox Allen, if he wish it. And I reserve the question of the amount to be allowed by the said William Cox Allen for the maintenance of the said children for any future application to the Court or to any Judge."

Afterwards, on the 12th of July, 1869, William Cox Allen applied to the same learned Judge for and obtained

a summons to his wife, to shew cause why the order of the 3rd of July should not be discharged or rescinded, because the same should not have been and had been improvidently made, and because it had been made without notice to the said William Cox Allen, and without giving him an opportunity of being heard on the application for the said order; and on the ground that the facts were misunderstood or had been misrepresented, and no ground had been shewn for making the said order; and because the said William Cox Allen was entitled to and should have had the care and custody of his children, and they should not have been delivered to the care and custody of his wife; and on grounds disclosed in the affidavits and papers filed.

This summons was obtained on the affidavit of William Cox Allen, and upon nine other affidavits maintaining the principal affidavit of the husband.

His affidavit stated that there was an action tried at Cornwall on the 4th of May, 1869, in which he was plaintiff, and his wife's father was defendant, in which cause he said his wife voluntarily became a witness for the defendant, and charged him with having committed a crime: that the evidence was false and untrue, as she knew, and she therein committed perjury; and in consequence of such evidence he felt it to be impossible that she and he could any longer reside in the same house. The day after the trial, he said, in the presence of John Snetsinger, he made to his wife the propositions mentioned in his affidavit. They were to the effect: to fit up a house for her and supply her with a servant, and allow her to take their daughter Maude with her, and he would support them and the household; or he would allow her to take Maude with her and live at a boarding-house at his expense, and to see the other children every day, with the understanding that they were to return to his house to get their meals and to lodge.

The affidavit then stated that his wife had elected to go to a boarding-house, and had gone there with her daughter

Maude, and he had maintained them in all necessities, and he had no intention of taking his daughter from her so long as she kept her part of the agreement and remained away from boarding at her father's house: that she had gone away from his house on three different occasions, and remained away each time for some weeks; that her father and two other persons named had an ill-feeling towards him, and slandered him on every occasion they had: that for the last two years his wife had been in the habit daily of going to the houses of those three persons, and on returning, as he said, "to my own house of telling me, in the most insulting manner, that they, or some of them, had told her something very insulting to and abusive of me; and to their advice I attribute a great part of the unpleasantness which has occurred between me and my wife. Ever since since last fall more particularly, she has entirely neglected her children and household duties, and has been continually absent from my house except during a part of the night, and absent from my table. She went out usually about ten or eleven o'clock in the morning, and did not return until six o'clock in the evening, when she took her tea alone in the kitchen, and afterwards went out again, and remained out until between nine and twelve o'clock, and as soon as she came back she began to abuse me. She almost every night came to the door of my bedroom and abused me in the foulest language for from ten minutes to an hour, and on two or three nights for two hours. The children are attached to me and do not desire to leave me, and it is untrue the health of the younger children is suffering from want of care, and from being a physician I am enabled to and do take better care of their health than otherwise I could do. Even when my wife was at home with me the care of the children devolved upon me to a great extent, as their mother was almost always absent. It is untrue I ever punished any of my children for going to visit their mother; on the contrary, I sent them all over almost daily to see her. Often, when I have gone home about nine

o'clock in the evening, I have found the house deserted by my wife and the servants, and the children obliged to take refuge with the neighbour, Mr. Snetsinger. On several occasions I remonstrated with her for going out and leaving the children alone, to which she replied that she would do as she pleased; that her father and Judge Jarvis had told her to do so, and that she was not to give me any account of where she had been or what she was doing while out at night. The health of my younger children never was so good as it has been since their mother left, and the servant I have engaged attends to them very well, and keeps them neat and tidy. I had engaged a maiden lady of about fifty-five years of age to take charge of the children and of household matters, but who left in consequence of the order made herein, and who is ready to return as soon as that order is rescinded, and who is qualified to teach and instruct the children. I am not able to pay the expense of maintaining the two younger children with their mother, in addition to maintaining the child Maude."

The summons was enlarged from time to time till the 13th of August, 1869.

In addition to the affidavits first filed by him, Dr. Allen filed several supplementary affidavits, maintaining his original case, and making certain charges against his wife.

In answer to this case Mrs. Allen filed her own affidavits, and many others, sixty-two in number, utterly denying the case made out by her husband, and charging him with extreme cruelty and violence to her, and with neglect of and bad and pernicious teaching of her children. And she filed also a deed of separation, which was drawn between them in 1852, and which provided for her having the sole right to and control of the children she then had or might thereafter have of the marriage, in consequence of the cause of separation being "such as in England would call from the Ecclesiastical Courts there for a divorce *a mensâ et thoro*, and would justify the delivery of the children of the marriage to the mother,

and the removal of them from the custody and guardianship of the father (which causes it is unnecessary here to specify.)”

The result was, that the learned Judge, by his order of the 20th of August, 1869, discharged his summons of the 12th of July granted to Dr. Allen. (a)

The next proceeding taken was with respect to the attachment of Dr. Allen. Mr. Justice Morrison, on the 23rd of August, 1869, issued his summons calling on Dr. Allen to shew cause why he should not be committed to the close custody of the gaol of the united counties of Stormont, Dundas, and Glengarry, or of such other county or united counties wherein the said William Cox Allen might happen to be found, for contempt or disobedience of the said order, (of the 3rd of July, 1869,) there to remain in custody till he should purge himself of such contempt.

This application, after having been argued on both sides and affidavits filed, resulted in the order before mentioned of the 4th of September, 1869, by which it was directed that “a writ or writs of attachment for contempt be issued forth against William Cox Allen for non-delivery of the said Frederick Allen and Ethel Allen, pursuant to my said order.” (b)

Upon this order a writ of attachment to take the body of Dr. Allen was issued on the 4th of September, 1869, tested the 5th of June, 1869, to have him before the Justices of this Court at Toronto on the first day of Michaelmas Term thereafter, to answer for certain trespasses and contempts by him committed. The writ was signed by the Clerk of Process, and was sealed with the process seal, and was in the margin marked as issued by the Clerk of the Crown and Pleas of this Court.

Dr. Allen, after a return of *non est inventus* by the sheriff of Stormont, Dundas, and Glengarry, to the attachment, surrendered himself into the custody of the said sheriff; and had been admitted to bail, and examined on interrogatories.

(a) The judgment is reported in 5 P. R. 443. (b) Reported in 5 P. R. 453.

Both rules were argued in Michaelmas Term 1869, before Morrison, J., and Wilson, J., who differed in opinion, and it was in consequence reargued in Hilary Term last.

Robinson, Q. C., shewed cause. As to the first rule, to set aside the Judge's orders, it is defective in point of form. It is drawn up "upon reading the affidavits and paper filed." Being an appeal from a decision in Chambers by a Judge, it was necessary to bring up all the materials on which the decision was made and to shew in the rule that it was based upon such materials, and that they had been brought up and refiled by leave of the Court. It should have been drawn up, therefore, "upon reading the affidavits filed in Chambers, and refiled upon this application by leave of the Court." The practice in this respect is well established, and the neglect to follow it has been held a good ground for discharging the rule, both here and in England: *Small v. Eccles*, 3 P. R. 189, 1 U. C. L. J. 122, N. S.; *Needham v. Bristowe*, 1 Dowl. N. S. 700; *Bennett v. Benham*, 15 C. B. N. S. 616; *Mitchell v. Harding*, 5 L. T. Rep. N. S. 348; *Warman v. Halahan*, 30 L. J. Q. B. 48; *Cesarini v. Ronzani*, 4 Jur. N. S. 813; *Dickey v. Mulholland*, 2 P. R. 69; *Ch. Arch. Prac.*, 12th Ed., 1580, 1610, 1611. This objection affects both applications, for the first rule attacks the order for the attachment, and if that be upheld the attachment must stand. (a)

2. The order of the Judge made under this Act is not appealable. He has an independent jurisdiction, not as representing the Court or acting as its substitute or deputy, and the order is not made in any cause or business in or of the Court. It is said by Alderson, B., in *Graham v. Connell*, 1 L. M. & P. 439: "The appeal from a Judge in Chambers lies only when his decision relates to the business of the Court. Where, as here, it has no relation to such business, but is collateral, there is no appeal to the Court unless it be expressly given by Act of Parliament." That was an ap-

(a) This and the preliminary objection to the motion against the attachment were taken at the opening of the argument, which proceeded subject to them.

plication to rescind the order of a Judge charging stock under 1 & 2 Vic. ch. 110. In *Kilkenny R. W. Co. v. Fielden*, 20 L. J. Ex. 141, 6 Ex. 81, 82, the principle is said to be, "that in all cases where a Judge at Chambers acts as a deputy of the Court, that is, disposes of applications which but for the press of business would be disposed of by the Court itself, the Court will review his decision, but that it was otherwise where the Judge at Chambers had an independent jurisdiction." Both these decisions apply here. In *Ch. Arch. Prac.* 12th Ed. 1609, it is said that when by a Statute power is given to a single Judge to decide a matter, an appeal in general lies to the Court from his decision, but the cases cited, in note *z* to support this do not, when the facts are examined, conflict with what is laid down in the two cases referred to.

3. The Judge had power to grant an order *ex parte*. In *Re Taylor*, 11 Sim. 180, the Vice Chancellor said he thought there was such power under the Act; and it must of necessity exist, for in some cases the giving notice or granting a summons would be taken advantage of to remove the children out of the jurisdiction and thus defeat the whole object of the application. Here it was stated to the Judge, though not on affidavit, that this course on the part of the father was apprehended; and that there was good ground for the apprehension is shewn by the fact that the children were so removed when it was attempted to enforce the order. He was right therefore in making the order; and if the power exists the exercise of it is peculiarly a matter within the Judge's discretion, not to be interfered with except on the clearest grounds. *Bullen v. Moodie*, 13 C. P. 139, and cases of that class, apply only where personal punishment is to be inflicted. As to the power of the Court generally in matters of this kind, see *Anon.* 2 Sim. N. S. 54; *Swift v. Swift*, 34 Beav. 266.

4. If an order *ex parte* is not under any circumstances authorized by the Act, this order cannot be supported; but if the granting such an order be discretionary with the Judge, as it clearly is, then, even admitting that the mate-

rials on which it was granted were insufficient, it cannot be interfered with now. The parties have since been fully heard by him on both sides, and upon this hearing he has affirmed the order. It will be urged that the facts were not fully stated in the petition and affidavits supporting it; that the Judge therefore was deceived; and that an order so obtained cannot stand, even if upon a full statement of all the facts it would equally have been granted. Authorities may be cited with regard to *ex parte* injunctions affirming this general doctrine, but they cannot apply here. The learned Judge was asked to rescind the order upon this ground, but he declared that he had not been deceived; and that upon a full consideration of all the allegations on either side, he was convinced that the original order *ex parte* was just and well warranted. Under these circumstances substantial justice has been done, and to apply the doctrine alluded to, would be to give effect to an objection purely technical.

5. The affidavits which it will be said the learned Judge should have received were rightly rejected, for they should have formed part of the original case on moving to rescind the order. This was at all events a matter within the Judge's discretion.

Then as to the rule to set aside the attachment.

The defendant cannot take advantage of the alleged irregularities, for when he moved against the attachment it had been returned *non est inventus* and an alias had issued. He was in contempt, therefore, having evaded the process. His conduct shewed that whether it was regular or not he did not intend to submit to it, and, under these circumstances, he could not be heard to attack it: *Attorney General v. McLachlin*, 5 P. R. 76. His application, moreover, should have been to set aside the alias writ.

The attachment was fully justified upon the merits, for the order had been disobeyed and the children removed with the husband's connivance, as the judgment appealed from, refusing to rescind the order for the attachment, clearly shews. The statements made by the applicant

were considered incredible, and properly so. See *In re Crossley*, 6 T. R. 701; *Ch. Arch. Prac.*, 12th Ed., 1718.

There was no necessity to make the judge's order a rule of Court before proceeding to enforce it. It is true that at common law it is no contempt to disobey a judge's order: *Re Turner*, 6 Dowl. 6; *Rex v. Faulkner*, 2 C. M. & R. 533; *Chilton v. Ellis*, 2 C. & M. 459. But here the statute expressly makes it a contempt to disobey orders. By section 10 all orders made under the act "shall be enforceable by process of contempt by the Court or Judge by which or by whom such order has been made;" and the judge therefore has power at once to enforce his own order: *Watson v. Bennett*, 5 H. & N. 831. If it were not so, many of these orders would be useless, for by rule 128 of T. T., 1856, *Har. C. L. P. Act*, 685, 2nd Ed., a Judge's order made in vacation shall not be made a rule of Court before the next term; and an order made after Easter term could therefore not be enforced until November following.

Then it is objected that, if the Judge could enforce his order, he should have done so by an order of his own, and that he could not direct an attachment to be issued by the Court. He might, perhaps, have attached the party by his own order; but the Act says the order shall be enforced "by process of contempt," &c. Process of contempt means ordinarily a writ of attachment, which can issue only from a Court, and the natural reading of this clause is, that the Court making an order shall enforce it by issuing such process, or that a Judge shall have power to direct it to be issued upon his fiat. If an order had been made to arrest the party it would then have been objected that this was not a "process of contempt" within the Act. The English statute, from which this is taken, 2 & 3 Vic, ch. 54, says all orders made shall be enforced by process of contempt of the High Court of Chancery. By C. L. P. Act, sec. 281, if a writ be not returned by the sheriff when directed by a Judge's order, the Court or a Judge "may order a writ of attachment to issue forthwith" against him, which is in effect what the clause in question enacts. By

Consol. Stat. U. C. ch. 24. sec. 41, when a debtor does not attend to be examined "the Court or Judge may order such debtor to be committed," &c. Here a committal under the Judge's order is plainly intended, and the language is very different.

Lastly, it is said that the attachment should not have been signed and sealed by the Clerk of the Process; but the statute disposes of this objection. The appointment of this officer was provided for by 19 Vic. ch. 43, sec. 2, and by sec. 4 he was to have a seal, and to "seal therewith and sign all writs and process whatsoever" from either Court. This section in the consolidation is distributed in two statutes, ch. 10, secs. 35 & 36, by which he is to seal and sign "all writs and process," and C. L. P. Act, secs. 4, 5. It has been held that he should sign and seal a mandamus: *Burdett v. Sawyer*, 1 P. R. 398; and an attachment against an absconding debtor: *Wakefield v. Bruce*, 5 P. R. 77. The writ here was signed and sealed by the Clerk of the Process, and issued from the office of the Clerk of the Crown, which is strictly correct.

Harrison, Q. C., and *J. K. Kerr*, supported the rules. As to the preliminary objection to the first rule, it does not appear the leave of the Court was not obtained to the proceedings in Chambers being used in Court, and moreover such leave is not required. It is sufficient if the proceedings were in Court when the motion was made, and were used on the motion: *Waddell v. Corbett*, 26 U. C. R. 243. If the application were defective in the first instance in this respect, such defect has been cured by the opposite party making and filing an affidavit on these motions, that the papers and affidavits filed here are those which were made and filed in Chambers.

The orders are reviewable: *Warde v. Warde*, 2 Phil. 787; *Brown v. Bamford*, 9 M. & W. 42; *Morris v. Manesty*, 9 Jur. 1034; *Teggin v. Langford*, 10 M. & W. 556,

The father is entitled to the custody of his children, since the passing of the Statute in question, as well as

before, unless a very strong case is made out to justify an interference with his rights: *Taylor v. Taylor*, 4 Jur. 959; *Re Hakewill*, 12 C. B. 223; *Regina v. Clarke*, *Re Race*, 7 E. & B. 186; *Cartlidge v. Cartlidge*, 6 L. T. N. S. 397; *Codrington v. Codrington*, 10 L. T. N. S. 387; *Re Winscom*, 13 L. T. N. S. 14; *Re Eves*, 15 Grant 580; *Re Halliday's Estate*, 17 Jur. 56; *Curtis v. Curtis*, 5 Jur. N. S. 1147; *Re Fynn*, 12 Jur. 713, 13 Jur. 483; *Warde v. Warde*, 2 Phil. 47, 787; *Ball v. Ball*, 2 Sim. 35; *Lyons v. Blenkin*, Jacob 245, and notes; *Corsellis v. Corsellis*, 1 Dr. & War. 235; *Macpherson on Infants*, 164; *Forsyth on Infants*, 137; *Ex parte Bartlett*, 2 Coll. 661; *Re Tomlinson*, 3 DeG. & Sm. 371; *Swift v. Swift*, 34 Beav. 266; *Anonymous*, 2 Sim. N. S. 54; *Ferrers v. Ferrers*, 1 Hagg. Cons. R. 133; *In re Taylor*, 11 Sim. 185.

The petition does not shew any sufficient reason for removing the children from their father. The reasons are: 1. That Mrs. Allen was forbidden her husband's house; 2. That he was Mayor of Cornwall, and could not attend to his children; and 3. That the children were delicate. These grounds were insufficient to justify the order; and at any rate it should not have been made *ex parte*. The general principle is against such a course: *Ex parte Kinning*, 4 C. B. 501; *Bullen v. Moodie*, 13 C. P. 126; *Ponton v. Bullen*, 2 E. & A. Rep. 379; *Re Hicks*, 5 P. R. 88. In *Re Taylor*, 11 Sim. 185, it was said an *ex parte* order might be made if necessary, but that must mean on a case of necessity being made out, which was not done here. The grounds alleged were at all events disproved by Allen when he applied to rescind the order. The learned Judge, for want of a full and true statement of the facts, was led into making the order improvidently. It was the proper course to apply to him to set it aside before coming to the Court: *Day v. Vinson*, 9 L. T. N. S. 654; and it should have been rescinded.

If the Court or Judge be deceived into making an order, no subsequent facts brought to notice will sustain that order, although they might have been sufficient to authorize it if

produced in the first instance : *Re Winterbottom*, 15 Beav. 80; *Re Hinton*, 15 Beav. 192; *Re Gedye*, 15 Beav. 254; *Clifton v. Robinson*, 16 Beav. 355; *Dalglisch v. Jarvie*, 2 Mac. & G. 242; *Hilton v. Lord Granville*, 4 Beav. 130; *Ley v. McDonald*, 2 Grant 398; *McMaster v. Callaway*, 6 Grant 577; *De Feuchères v. Dawes*, 11 Beav. 46; *Shaw v. Nickerson*, 7 U. C. R. 541. It is said that the motion to rescind the order of the 3rd July, and being heard on the merits on that motion, was a waiver of the making of the order *ex parte*. But on that motion a great many new facts were brought before the Judge by Mrs. Allen, and her husband was not allowed to answer them; and on these new facts, which had no relation to the original complaint, the Judge maintained his first order. They should, if acted on at all for that purpose, have been set forth in the petition.

As to the third order, of the 4th of September, for an attachment, it should not on the merits have been made, for Dr. Allen had not committed any contempt. The disobedience must be clearly shewn to have been wilful, and all the necessary papers to support the motion for the attachment must be served at the same time. Here there was no wilful disobedience. The children had been taken out of Dr. Allen's custody when he was absent from home, and had been removed to the States without his knowledge. This is positively sworn to, and not disproved. At the time of the demand, therefore, it was out of his power to comply with the order, and he is being punished for not doing what was not practicable. It was not shewn either that he knew the matter had been adjudicated when the demand to give up the children was made on him: *Dodington v. Hudson*, 1 Bing. 410; *Netherwood v. Wilkinson*, 17 C. B. 226; *Clare v. Blakesley*, 1 Scott N. R. 397, *Ch. Arch. Prac.*, 12th Ed. p. 1712 note (e); *Barton v. Field*, 4 Moo. P. C. 273; *Rogers v. Twissel*, 3 Dowl. 572; *Doe Sturges v. Ward*, 2 Dowl. N. S. 706; *Lush's Prac.* 864; *Ch. Arch. Prac.*, 11th ed., 1688; *Cooke v. Tanswell*, 8 Taunt. 131; *Re Doding-*

ton and Bailward, 7 Scott 733, 7 Dowl. 640; *Rex v. Sheriff of Kent*, 1 Marsh. 289; *Dodington v. Hudson*, 1 Bing. 410; *Regina v. Vickery*, 12 Q. B. 478; *Re Hicks*, 5 P. R. 90. Dr. Allen did not know that Sedgwick, who was named in the power to demand the children, was so authorized: *France v. Wright*, 3 Dowl. 325. It did not appear the children were not given up on demand or before it; and Dr. Allen's answer, that the children were not in his custody, is consistent with that having been the case: Ch. Arch. Prac. 12th Ed. 1687; *Gardner v. Creswell*, 2M. & W. 319; *Manwell v. Thompson*, 6 D. & L. 91.

The application for process of contempt should have been to the Court, and not to a Judge: Ch. Arch. Prac. 1716; *Lush's Prac.* 947, 955; *Baker v. Rye*, 1 Dowl. 689; *Re Turner*, 6 Dowl. 6; *Rex v. Faulkner*, 2 Cr. M. & R. 525; *Van Sandau v. Turner*, 6 Q. B. 773.

The order should have been made a rule of Court before the attachment issued. There is no contempt in disobeying a Judge's order: *Chilton v. Ellis*, 2 Cr. & M. 459; *Woollison v. Hodgson*, 3 Dowl. 178; *Swinfen v. Swinfen*, 25 L. J. C. P. 303; *Plumb v. Miller*, 5 O. S. 484; *Hinchcliffe v. Jones*, 4 Dowl. 86; *Chadwick v. Stricknell*, 10 W. R. 319; *Malpass v. Mudd*, 3 H. & N. 246.

The Judge could no more order the attachment to issue from the Court when his own order was disobeyed, than the Court could order the Judge to issue an attachment when the order of the Court was disobeyed. There was no contempt against this Court, and the attachment therefore improperly issued from it, and the order did not warrant it, for it was a mere order for an attachment, not specifying from what Court it should issue. The Judge in this case should have made and issued the attachment under his own hand, as when he commits for not answering interrogatories: *Kemp v. Neville*, 10 C. B. N. S. 523; *Regina v. Mason*, 5 P. R. 125. When an application is made to a Judge under this Act, the proceedings should not be entitled in any Court. If they are entitled in the Court of which he is Judge, and he is removed into the other Court, are the

proceedings then to be carried on in the other Court? The Judge of a Division Court acts, and the Police Magistrate may give protection orders to married women, under Consol. Stat. U. C. ch 73, but these orders are not entitled in any Court.

It was said that enlarging the summons for an attachment, had waived all objections to the previous proceedings; but it had no such effect. Cause could not possibly have been shewn to the summons without an enlargement, for service was made at Cornwall, and cause had to be shewn at Toronto in two days time. It would be unreasonable, therefore, to allow Dr. Allen to be prejudiced by an enlargement which was unavoidable. The time allowed for shewing cause was too short.

Then as to the officer who should have issued the process of attachment, if it were rightly issued by the Court. The process clerk should issue all writs to begin suits. He supplies the parties with such writs, and he is to supply other writs to the Clerk of the Crown of the two Courts to be issued by them; but he is not to sign or seal them. This, it is conceived, is the proper interpretation of the Statutes: *Wakefield v. Bruce*, 5 P. R. 81 was decided with doubt.

The process is not in a legal or usual form. It is to arrest for contempt generally, not shewing what the contempt was. The nature of the contempt should have been specified with certainty.

WILSON, J.—The preliminary objection taken to the rules must be first considered.

The rules are drawn up "Upon reading the papers and affidavits filed," and it is said that the affidavits and papers which were filed and used in Chambers are not properly in or before this Court, although used and filed in fact here, because the rules do not state that they were granted "upon reading the affidavits and papers *used in Chambers*," or because it is not shewn that the affidavits and

papers which were used in Chambers had been brought or transferred here by the authority of the Court.

The case of *Small v. Eccles*, 3 P. R. 189, was cited as a decision in support of the objection.

In that case a summons for the production of documents had been granted in Chambers on an affidavit filed there, which summons was discharged. In the term after a rule *nisi* was granted for the same purpose, on the same affidavit that had been used in Chambers, the only reference to it in the rule being, "on the grounds disclosed in the affidavits filed," and no reference was made in the rule to the preceding motion in vacation. The learned Chief Justice said: "How the plaintiff got this affidavit off the file on which it was placed in Chambers and produced it on moving this rule, is not shewn, or rather it is not shewn that the Court permitted it to be done. The rule itself does not disclose that it is drawn up on an affidavit which has been already used, and such has been the practice in our Courts, and it is founded on the English practice. If, as is stated in the defendant's affidavit, the summons was discharged, it is the more necessary that the attention of the Court should be drawn to the fact that the rule was moved upon the original affidavit. We consider this to be irregular. * * We discharge this rule on the point of practice, and, as it is on the ground of irregularity, with costs."

The rule to which this objection chiefly if not altogether applies is the one, "In the matter of Harriet Louisa Allen," &c., that is, in the proceeding which was pending in Chambers anterior to the issuing of the attachment.

How far the objection, if good in some cases, can prevail here, when this rule calls on the original petitioner to shew cause why certain orders made by a Judge in Chambers should not be set aside, which is a clear declaration that it is Chambers proceedings which are the subject of the motion, and an intimation that "the affidavits and papers" referred to in the rule do include the Chambers proceedings, must now be considered.

Before giving effect to the objection we must consider also the meaning to be placed on the allegations of the rule which shew that the Chambers proceedings are expressly alluded to.

It is said in the rule that the order of July should not have been made "on the affidavits and papers filed on the application for the order, and that the facts were misrepresented on the application and concealed," and there are other expressions of the like kind as to the order of September. Here the application is expressly by way of appeal; it is not and it does not profess to be an original proceeding.

The case in question does not then strictly apply, for the Court has been plainly informed that the motion made here is based upon the anterior Chambers proceedings.

The English practice on the subject is as follows: In moving to set aside a Judge's order, it is sufficient to state the substance of the order in the affidavit filed; it is not required that a copy of it be attached to or be set out in the affidavit: *Shirley v. Jacobs*, 3 Dowl. 101.

If the rule be drawn up on reading the Judge's order, that will be sufficient, although the affidavit filed do not notice the order: *Attwell v. Baker*, 5 Dowl. 462.

On an application to set aside a Judge's order alleged to have been improperly made, the materials on which it was made must be brought before the Court; merely mentioning the affidavits formerly used will not answer. And the proper course to get the Chambers proceedings is "to give notice to the Judge's clerk that the affidavits are required, and then he will send them into Court": *Needham v. Bristowe*, 4 M. & G. 266, per Coltman, J.; *Ch. Arch. Pr.* 11th ed. 1598; *Bigby v. Kennedy*, 5 Burr. 2652.

The Court will not take notice of proceedings which have taken place at Chambers, unless stated on affidavit. The case of a Judge's order is different. The order speaks for itself.

When therefore it was necessary to shew a previous application in Chambers, in order to prevent the new

motion being apparently too late, which it would be if no previous motion had been made, or if it were not shewn to have been made, the fact of such previous motion must be laid before the Court by affidavit, and the Court will not receive the statement of the learned Judge, though present on the bench, that such a motion had been made before him: *Goren v. Tute*, 7 M. & W. 142.

In *Needham v. Bristowe*, 4 M. & G. 262, it does not appear that the Court required more than that the Chambers proceedings should have been in Court when the motion was made, so as to have been read upon the motion.

In *Sugars v. Concanen*, 5 M. & W. 30, it was objected that the previous Chambers application did not appear upon the affidavits or the rule. Parke, B., said the Court would not then receive the Judge's summons and order, "because if the rule had been drawn up on reading it (the order,) the other side might have given some explanation of it by affidavit." And Alderson, B., said, "The question is whether, the rule not being drawn up on reading it, they might not reasonably suppose you did not mean to rely upon it."

The same case in 7 Dowl. 391, is rather differently stated. Lord Abinger said, "We cannot notice that, as the rule is not drawn up on reading the order of the learned Judge, nor does it appear by affidavit." The Court disposed of the case as follows:—"The Court cannot notice what passed at Chambers, as it does not appear by affidavit, nor is the rule drawn up upon reading the order of the learned Judge; nor is there any notice given to the other side, who might reasonably suppose that the defendant did not mean to rely upon that."

In *Thomas v. Evans*, 9 M. & W. 829, a rule was obtained to rescind an order in Chambers which stayed proceedings. The Judge refused to rescind his order. No mention was made in the motion in Court of the application to the Judge to rescind his order. Lord Abinger, C. B., said, "What the Judge has done must be brought

before the Court, but surely not what he has omitted to do." Parke, B., said, "In *Goren v. Tute*, it was necessary to state the previous proceedings at Chambers, in order to account for the delay in making the application to the Court."

When a Judge refuses to make an order, the party may apply to the Court, and may use further affidavits and state other facts, for the motion in Court is an original application; but when the Judge makes an order and the motion is to rescind it, that is an appeal, and the parties are confined to the same facts which were before the Judge: *Cesarini v. Ronzani*, 4 Jur. N. S. 813.

Warman v. Halahan, 6 Jur. N. S. 1301, shews that, when the application by statute may be to the Court or to a Judge, and the Judge declines to make an order, the application to the Court is not an original motion, but by way of appeal, and the rule should be drawn up upon reading the affidavits used at Chambers.

In *Bennett v. Benham*, 15 C. B. N. S. 616, the head-note is: "After an unsuccessful application to a Judge at Chambers, the plaintiff, on applying to the Court, must bring before it all relevant materials which were used before the Judge." The rule was drawn up on reading the affidavit of the plaintiff, and also an affidavit of the plaintiff's attorney, which stated, among other facts, that he took out a summons which was attended before Willes, J., when the learned Judge took time to consider, and ultimately endorsed the summons "No order." It was contended the rule should have been drawn up on reading the affidavits used at Chambers. The Court held, "All the materials used at Chambers which were at all relevant to the matter having been brought before this Court, we think the plaintiffs have sufficiently complied with the rule of practice."

In *Waddell v. Corbett*, 26 U. C. R. 243, it was held that, when a summons to set aside a judgment has been discharged, an application to the Court for the same purpose is an appeal, and not an independent motion, and all the

papers used in Chambers must be brought before the Court.

In *Mitchell v. Harding*, 5 L. T. N. S. 348, an order to inspect was refused by a Judge. An application was made for the same purpose in Court. Blackburn, J., said, "The question is whether you can come here without an affidavit shewing that an application had been made to a Judge at Chambers, and the grounds of his refusing it. You must state on affidavit what really occurred at Chambers, and what are the materials upon which the Judge decided." Cockburn, C. J., said, "You have not the affidavits used there, and you are bound to come to the Court on the same materials. The rule is, that the rule *nisi* in this Court must be drawn up on reading the affidavits used before the Judge. * * The rule seems imperative, and I don't see how we can alter it. The decision in *Warman v. Halahan* is clearly in point, and is against you. To do as you wish (*i.e.* to amend the rule), we should have to mould the rule *nisi* by reciting that it was granted on reading affidavits read at Chambers, which would not be the fact. Consider if you can bring it before the Court in any other shape." The rule was then discharged without costs, and a new rule to shew cause was granted, upon the production of an affidavit stating what the materials were which had been produced before the Judge at Chambers.

The result of these decisions seems to be that, in all cases of *appeal* from a Judge in Chambers, the materials which were used before the Judge must be produced to the Court appealed to.

The authorities are not quite uniform as to what is an appeal. If a Judge has *refused* to make an order, a motion to the Court for the same matter has been held not to be an appeal, but an original motion: *Hallett v. Cresswell*, 10 Jur. 266; *Thomas v. Evans*, 9 M. & W. 829; *Cesarini v. Ronzani*, 4 Jur. N. S. 813;—while *Warman v. Halahan*, 6 Jur. N. S. 1031; *Bennett v. Benham*, 15 C. B. N. S. 616; and *Mitchell v. Harding*, 5 L. T. N. S. 348, are to the contrary.

The next point is, what is sufficient to constitute a bringing of the materials which were used in Chambers before the Court appealed to ?

Drawing up the rule *nisi* "on reading the affidavits and papers filed in Chambers on the application made in this cause," and filing the same in Court on the motion, will be sufficient, from the cases above referred to.

It appears, however, that filing an affidavit in Court on the motion stating what proceedings took place at Chambers, and then drawing up the rule "on reading the affidavits filed," will be sufficient: *Shirley v. Jacobs*, 3 Dowl. 101; *Needham v. Bristowe*, 4 M. & G. 262; *Goren v. Tute*, 7 M. & W. 142; *Pocock v. Pickering*, 18 Q. B. 789; *Sugars v. Concannon*, 7 Dowl. 391; *Heath v. Nesbitt*, 11 M. & W. 669; *Bennett v. Benham*, 15 C. B. N. S. 616; *Mitchell v. Harding*, 5 L. T. N. S. 348.

The proceedings in Chambers may be procured by giving notice to the Judge's clerk that they are required in Court, and he will deliver them to the officer acting as clerk of the rules. If the latter officer have them, notice should be given to him to have them in Court: *Ch. Arch. Prac.*, 11th ed., 1598; *Needham v. Bristowe*, 4 M. & G. 262; or copies which are verified may be used: *Pocock v. Pickering*, 18 Q. B. 789.

It is nowhere expressly decided in any English case that when the affidavits are in fact in Court, and read and filed on the application, that they are not then fully referred to in the rule under the general form "on reading the affidavits and papers filed." The cases before referred to shew that if that be done it will be sufficient.

It is unquestionably better that the rule to shew cause should be drawn up on reading the Chambers papers as well as all the other papers on which it was founded; but if it be drawn up on reading affidavits and papers which do disclose the Chambers proceedings, it will be sufficient. In no case does it seem to be necessary to have the leave of the Court to use or refer to the Chambers proceedings. The parties have the right to use them without such leave.

In this case affidavits were filed on the motion verifying copies of the several orders and of the writ of attachment, and in addition there was filed, on behalf of Mrs. Allen, an affidavit made on the 2nd of December, 1869, "that the several orders referred to in the rule *nisi* granted in this matter during the present term were made upon certain affidavits filed in Chambers, both for and against the applications upon which said orders were made, and that these affidavits have been refiled in this Court on moving for and obtaining the said rule *nisi*."

I think that the motion founded upon the actual reading and filing in Court of the Chambers proceedings is not defective, merely because the rule has been drawn up "on reading the affidavits filed" generally, instead of specially "upon reading the affidavits and papers filed and used in Chambers," &c.

The rules expressly referring to the Chambers proceedings, and claiming to have the orders made therein set aside is an additional reason why the rules should be maintained. But after the affidavit filed on behalf of Mrs. Allen that the Chambers proceedings were brought before the Court and filed on the motion being made, the objection, if it be one, is no longer open to her.

If the objection had prevailed, it should have been remedied, according to the case of *Mitchell v. Harding*, 5 L. T. N. S. 348, by inserting in the rule after "affidavits and papers" the words "*filed and used in Chambers*," because they were read in fact in this Court; and such amendment might, I think, have been made on the spot, and without the payment of costs, according to the case just cited.

For the reasons given, the preliminary exception taken cannot be sustained.

Then it was said this motion could not properly be made by Dr. Allen, as he was in contempt at the time in respect of these matters, and had therefore no *locus standi*, until he had submitted to the process and jurisdiction of the Court.

The fact was that Dr. Allen had not been taken or surrendered himself on the attachment when the motion was

made, the motion being made not in person but by attorney. Is that contempt, or apparent contempt, a bar to the motion being made?

Before the 4 & 5 Wm. & M. ch. 18, sec. 3, the motion to reverse an outlawry must have been in person: *Plunkett v. Buchanan*, 3 B. & C. 736. And the person outlawed can make no motion in Court (but to reverse his outlawry) until the outlawry is set aside, "for by his contumacy he is out of the King's protection, and shall have no privilege or benefit from that law of which he is a violator, and to which he refuses to be amenable." Per Park, J., in *Loukes v. Holbeach*, 4 Bing. 419. See also *Aldridge v. Buller*, 2 M. & W. 412; *Re Mander*, 6 Q. B. 867; *Re Pyne*, 5 C. B. 407.

In *Hawkins v. Hall*, 1 Beav. 73, the Master of the Rolls said, "An outlaw is not entitled to come into a court of justice to establish a demand of his own; but this is not the question. * * The question is, whether, when a party has been improperly detained, he has not a right to come into Court to get rid of the irregular proceedings. * * He must be entitled to apply to a Court of Justice to remove an irregular order by which he is improperly detained." The attachment, which was irregularly issued, was thereupon set aside.

In *King v. Bryant*, 3 M. & C. 191, a party in contempt is entitled to be heard in Court, to shew that proceedings against him subsequent to the order placing him in contempt are irregular.

In *Walker v. Thellusson*, 6 Jur. 36, it was held that an outlaw who has been taken on a *Ca. Sa.* on a judgment more than a year old, but not revived by *Sci. Fa.*, may apply to be discharged from custody; for outlawry, though it prevents the outlaw from resorting to the law as against third parties for his own benefit, does not preclude him from having recourse to it to protect his person from wrongful arrest.

In the same case, 6 Jur. 345, it was held the outlaw could apply to set aside proceedings irregularly taken

against him; for, though he is not allowed to originate a legal right of his own, he is entitled to be heard when he comes to the Court in matters purely defensive. *Davis v. Trevanion*, 9 Jur. 492; *Regina v. Lowe*, 8 Ex. 697, are to the same effect.

These cases shew that the motion, so far as it is purely defensive, may be made by Dr. Allen notwithstanding his contempt. And it is defensive throughout.

The case of *The Attorney General v. McLachlin*, 5 P. R. 63, does not fully apply, assuming that case to have been well decided. There the defendant had been served with process to appear. He did not appear. An attachment issued against him for his contempt. He moved against the attachment as irregularly issued (the other objections taken having been decided against him), and it was held he could not complain of that process as he had never been affected by it, and had not appeared in the cause. Here Dr. Allen has been a party to all the proceedings taken before the Judge of which he complains, and of which he may complain, though he has since then got into contempt. See also *Curtis v. Curtis*, 5 Moo. P. C. 256,

This disposes of the preliminary objections. The applicant then objected to the proceedings which had been taken on the part of his wife—that the order should not have been made *ex parte*.

The Statute gives no directions as to the course of proceeding to be taken further than that a petition is to be presented. The enactment is, Consol. Stat. U. C. ch. 74, sec. 8, that “Any of the Superior Courts of Law or Equity or any Judge of any such Courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father * * may, if such Court or Judge sees fit, make order,” &c.

The Court or Judge may enforce the attendance of any person “to testify on oath respecting the matter of such petition, or may receive affidavits respecting the matters in such petition”: sec. 9. And no order is to be made in favour of a mother against whom adultery has been estab-

lished by judgment in an action for criminal conversation : sec. 11.

The general rule certainly is that an *ex parte* order shall not be made affecting the rights of another ; that an adjudication shall not be made against one without first hearing him, or giving him an opportunity of being heard. If it be so made, it is as if no adjudication had been made : *Clarke v. Stocken*, 2 Bing. N. C. 651.

And the rule of law certainly is that the father is entitled to the custody of his infant children, however tender their age may be : *Rex v. DeManneville*, 5 East, 221 ; and although he is living separate from their mother, and in adultery, so long as he does not bring his children into the same house with or into the company of the woman he lives with : *Ex parte Skinner*, 9 Moore, 278 ; *Ball v. Ball*, 2 Sim. 35 ; *Rex v. Greenhill*, 4 A. & E. 624 ; and although he has driven away his wife by his cruelty and misconduct : *Ibid.*

At common law there is no authority to remove children from their father's custody for any cause whatever : *Re Hakewill*, 12 C. B. 223.

And it would seem that the Courts of Equity possessed no such power either, unless the infant had property over which the Court could assume jurisdiction, and so control the person as well as the property of the infant : *Re Fynn*, 12 Jur. 713, 13 Jur. 483.

There were several cases cited to establish the general rule that no one should be condemned until he has been heard. The rule is not denied.

But it is said this is a matter which is an exception to the rule, and that the case of *Re Taylor*, 11 Sim. 180, is a decision to that effect. That was the first proceeding under the Imperial Statute, but it was not an *ex parte* order. The Vice Chancellor said, "He thought that in a gross case he might make an order under the Act *ex parte*, on the ground of necessity"; but he did not do so; he directed service of a copy of the petition to be made on the professional agent of the husband, who attended and opposed the application successfully.

It is not necessary to deny the right of the Court or Judge to proceed summarily in a case of necessity. If the husband were in the course of conveying the children out of the country, or would be likely to do so if he knew of an application being made, or about to be made, against him, it would be an idle proceeding to call upon him to shew cause why he should not deliver up the children. The course in such a crisis would be to arrest the removal of the children, as you would arrest a debtor in his flight. It must be the necessity of the case which can justify the proceeding. The *ex parte* deprivation of a father of the custody of his children must be the exceptional and extraordinary mode of proceeding against the father. It is not contended that it is the ordinary and customary course.

In *Ex parte McClellan*, 1 Dowl. 81, the father obtained a rule to shew cause why a *habeas corpus* should not issue to bring up his infant daughter from the custody of her mother, and it was made absolute.

In *Ex parte Witte*, 13 C. B. 680, the father got a *habeas corpus* in the first instance, commanding the mother (from whom he had been divorced) to bring up the body of their infant son, although he had made no demand of the child, he swearing that he believed "if any notice of this application were given to the said Marie Witte or her said father, the child would be removed beyond the jurisdiction of the Court."

In a note to the case it is said that, in 1 Dowl. 81, "a rule to shew cause why the writ should not issue only was granted, and such is the modern practice."

That is what is said of cases in which the father is the applicant, the person having the sole general legal right to the custody of his children; and no case has been stated in which the children have been taken from their father under an *ex parte* order.

In the present case it is not contended that any gross case, or any case of necessity, was shewn in the affidavits originally filed to justify the removal of the children from their father without notice being first given to him.

In *Stacey v. Stacey*, 29 L. J. Mat. 63, the Judge ordinary would not remove the children from the father, though cruelty to the mother was alleged, and she was separated from him, till both parties were before him.

The validity of this order is rested on the discretionary power which a Judge under the statute possesses to proceed *ex parte* in every case if he please, and on the ground that his discretion is not subject to be reviewed by the Court. It was insisted that the Judge acts by a power original and independent of the Court, and however wrong his decision may be, that it cannot be questioned or appealed from.

It is quite true that when a Judge has exclusive power to act no appeal lies from his order on the merits; but, in such a case, if the Judge exercise his power in a manner not warranted by the statute which confers the power, his decision must be subject to the control of the Court by prohibition, *habeas corpus* or otherwise, as are the decisions of all subordinate tribunals. The cases of *Brown v. Bamford*, 9 M. & W. 42, *Morris v. Manesty*, 9 Jur. 1034, and *Wearing v. Smith*, 9 Q. B. 1024, are in point, and the case of *Ex parte Kinning*, 4 C. B. 507, shews a state of things in which the Court would be obliged to interpose. And the case of *Regina v. Price*, L. R. 6 Q. B. 411, shews the Court did interpose by mandamus, and that a writ might in certain events be directed to a Judge to shew cause why he should not do the act required of him.

It is contended, however, by Dr. Allen, that these orders can be appealed from, as Judge's orders made in ordinary matters pending in the Courts are appealable, while, on the other side, it is argued that the Judge is acting by the statute by a power independent, though not exclusive, and which is not in any manner connected with or subordinate to the Court.

The question then is, is this proceeding of the Judge under the Statute the subject of an appeal to the Court?

The Statute confers power upon "the Superior Courts of

law or equity, or any Judge of any such Courts," to permit access of the mother to her children "if such Court or Judge sees fit, at such times as such Court or Judge thinks convenient and just," and to make order for delivery of the children, if under twelve, to the mother "subject to such regulations as such Court or Judge may direct," and to make provision for the maintenance of the children as, according to the pecuniary circumstances of the father, or the value of the infant's estate, such Court or Judge thinks just and reasonable. So "the Court or Judge may enforce the attendance of any person before such Court or Judge to testify, &c., in the same manner as in a suit or action in the said Courts," &c. And "all orders made by the Court or Judge shall be enforceable by process of contempt by the Court or Judge by which or by whom such order has been made."

It will be necessary to examine the authorities on this point. In *Ch. Arch. Prac.*, 11th Ed., 1586, it is said, in some cases, instead of applying to the Court, an application may be made to a Judge at Chambers, and in some cases the latter has exclusive jurisdiction * * * When a Statute expressly or impliedly directs that the application shall be made only to the Court, a Judge has no power to interfere, and *vice versa*. But when a Statute in general terms, and without any special limitation either expressed or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers."

Under the Act 1 & 2 Vic. ch. 110, it is provided that if it be shewn to the satisfaction of a Judge of one of the Superior Courts that there is probable cause for believing the defendant is about to quit England unless forthwith apprehended, and that he is indebted to the plaintiff, &c., the Judge shall direct the defendant to be held to bail for such sum as he shall think fit, not exceeding the amount of debt or damages. This corresponds with our own Consol Stat. ch. 24 sec. 5. In such a case a Judge alone can make the order for arrest, and not the Court: *Harvey v. O'Meara*, 7

Dowl. 735; *Bentley v. Berrey*, 7 M. & W. 146; *Barnett v. Crow*, 1 Dowl. N. S. 774.

By the sixth section of the Imperial Act, 1 & 2 Vic. ch. 110, the Court may set aside the arrest when ordered by a Judge on insufficient grounds. This agrees with our C. L. P. Act sec. 31.

But it is said in *Ch. Arch. Prac.* 782, 11th Ed., that before the English Act when arrests were made, as in trover, under a Judge's order, the Courts would review the proceedings of the Judge: *Clarke v. Cawthorne*, 7 T. R. 321; *Woolley v. Thomas*, 7 T. R. 550.

Under the same Imperial Statute a Judge alone has power to make an order charging stock in the public funds with the payment of the judgment debt; and Lord Abinger, C. B., said, "the statute expressly gives to the Judge, and not to the Court, the power of making orders of this nature. If he thinks fit to make an order, the Court has authority to set it aside, but we have no original jurisdiction to make such an order." Parke, B., speaks in the like way: *Brown v. Bamford*, 9 M. & W. 42. See also *Fowler v. Churchill*, 11 M. & W. 57; *Morris v. Manesty*, 9 Jur. 1034.

In *Teggin v. Langford*, 10 M. & W. 556, it was contended that the order of a Judge made under the interpleader Act 1 & 2 Vic. ch. 45 sec. 2, directing the payment of costs, could not be appealed from: that the Statute vested the whole discretion in him, and that he acted in such cases as the Court. Parke, B., said, "Generally speaking it means subject to be reviewed by the Court if wrong. Must it not in this case mean subject to such appeal as Judge's orders usually are subject to?" On which the rule was made absolute.

Our Interpleader Act, Consol. Stat. U. C. ch. 30, sec. 8, amended by 28 Vic. ch. 19, sec. 2, gives power to the Courts or to a Judge to act in such a case. This Act is in that respect similar to ch. 74, the one in question. When a Judge decides a case of interpleader by consent of parties his decision cannot be reviewed: *Shortridge v. Young*, 12 M. & W. 5.

A Judge and not the Court has power under the 5 & 6 Vic. ch. 122, sec. 42, to discharge a prisoner from custody who has obtained his certificate of discharge. But if the Judge erroneously make an order the Court may review it: *Wearing v. Smith*, 9 Q. B. 1024; see *Clark v. Smith*, 3 C. B. 982.

The Judge who tried the cause can amend the *postea* by his order, and the Court cannot review the order. "The *postea* is the return of the Judge, and he is responsible for it": *Daintry v. Brocklehurst*, 3 Ex. 691. So the Judge of Assize who discharges a jury in a capital case, when and because they cannot agree, does so when he is of opinion a necessity has arisen to justify him in doing so, and his decision is final and cannot be reviewed by any legal tribunal: *Winsor v. The Queen*, L. R. 1 Q. B. 390, 394.

In *Smeeton v. Collier*, 1 Ex. 457, a Judge had made an order under the 7 Geo. II. ch. 20, for delivery up to the defendant of the mortgage he had given to the plaintiff, and on which he was sued, he having paid the same and all costs. The Statute enacts that "the Court" shall in such a case discharge the mortgagor. It was argued that a Judge had no power to make the order. Parke, B., said, "Unless a distinction is made in a Statute between the powers of a Judge and those of the Court, the Judge has the same power as the Court. When the legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose, and it is intended the Judge should exercise those powers." The Chief Baron and the other Barons expressed themselves in like manner.

In *The Kilkenny R. W. Co. v. Fielden*, 15 Jur. 191, a Judge in Chambers refused to make an order for security for costs to be given by the plaintiffs. On motion in Court for the purpose, it was objected that the Judge's discretion exercised in refusing to interfere was final. Parke, B., said, "This matter has been several times before the Courts, and the principle on which they proceed is, that the Court will always review the decision of a Judge where he is

acting merely as its deputy, but not when an entirely independent jurisdiction is given to him by Statute."

In *Ross v. The York, &c., R. W. Co.*, 13 Jur. 610, it was held the Court had no power to revise the taxation of costs by the Master of the Court, of an assessment under the Railway Act.

Per Pollock, C. B., in *Re Sheffield Water Works Act*, L. R. 1 Ex. 54: "The Master is a person appointed by the Legislature to perform a certain duty, and rather resembles an appraiser called in by the parties to settle a claim. But whatever his precise character may be, we cannot interfere with his decision."

Bramwell, B., said, "The Masters are merely twelve designated persons, not acting as officers of any Court, and we have no more jurisdiction to entertain an appeal from a Master of this Court than from a Master of the Queen's Bench."

The Courts will not review the decision of the Judge in granting a certificate for costs, on the ground that the grievance was wilful and malicious under the Statute; the Judge in such a case having an absolute discretion: *Barker v. Hillier*, 8 M. & W. 513.

Under the 1 & 2 Wm. IV., ch. 22, sec. 10, by which the depositions of witnesses taken under interrogatories are admissible if the Judge is satisfied that the witness is unable to attend at the trial from permanent sickness or injury, the Judge's decision is not final; as the statute does not expressly negative or exclude the application of the general principle that the Judge's decisions are subject to be reviewed by the Court when he acts as a member of the Court: *Duke of Beaufort v. Crawshay*, L. R. 1 C. P. 699, 706.

See the various decisions cited in which the Judge's discretion, as to whether sufficient search has been made for a lost instrument to let in secondary evidence, or whether a deed has been shewn to have come from the proper custody, and in other cases, has been reviewed.

In the case of *Re Taylor*, 11 Sim. 180, the Vice-Chan-

cellor held he had authority to act under the Statute, although only the Lord Chancellor and Master of the Rolls are named in it, because the Vice-Chancellors exercise the powers of the Chancellor.

And in *Warde v. Ward*, 2 Phil. 786, under the Imperial Act relating to the subject in question, an appeal was carried from the Vice-Chancellor to the Lord Chancellor.

On a review of these cases, it appears that when the Judge has exclusive power, as in amending his own *postea*, or in giving or refusing certificates for costs, his decision cannot be reviewed.

When he has power, and the Court has not power, to do an act, as to charge stock with the payment of a judgment debt, or to direct the payment of costs on an interpleader suit, his orders, if erroneous or irregular, are subject to review, but not on the merits.

When he is exercising a discretionary power, as in cases of arrest in trover under the old law and practice, and in refusing to grant security for costs, his order, or his refusal to make an order, will be reviewed.

In all cases where the Court alone is mentioned in the statute to do a certain act, and exclusive words are not used, a Judge has power to act as well, because by and through him the Courts commonly exercise their powers.

If it appear that the Court alone is to act, as if the proceeding must be taken in term time, or in open Court, then the Judge cannot act: *Smeeton v. Collier*, 1 Ex. 457.

The principle is, that the Court will always review the decision of the Judge when he is acting merely as its deputy, but not when an entirely independent jurisdiction is given to him by statute, or when he acts by consent of the parties. Generally speaking, it is meant that the powers of a Judge are to be exercised subject to an appeal to the Court.

In all the cases mentioned there was a proceeding of some kind pending in Court, so that it must have been intended the proceeding should be carried on conformably to the rules of the Court, and therefore be subject to revision.

In this case there is no suit or matter in Court of a contentious nature. There is a power granted to the Court and to the Judges of it. It is not an exclusive, independent, or peculiar power which has been granted to the Judges, but a power which they have in common with the Court because they are members or Judges of the Court.

It may be doubtful whether a Judge could have exercised power under the statute in question, if he had not been named ; probably he could not have done so, as the particular statute now under consideration relates to a subject not connected with any pending litigation ; and to avoid all doubt the power has been expressly granted to the Judge. It has been given to him also because he can act for the Court, and as representing it in vacation when the Court is not sitting. "The Courts are open throughout the vacation to transact Chamber business:" Per Pollock, C. B., in *Re Denton v. Marshall*, 1 H. & C. 659. That power, however, was granted with a knowledge that the Judge exercises his authority subject in general to an appeal to the Court.

The fact that the Judge by statute does exercise an original jurisdiction in such matters, as well as the Court, does not prove, as the decisions referred to clearly shew, that he is to act without appeal.

In my opinion an appeal does lie from a Judge's order made under this statute, firstly, if it have been irregularly made, and, secondly, upon the merits by way of review.

The next inquiry is, whether the proceedings had in Chambers are subject to be complained of on the grounds taken. The objection that the order should not have been made *ex parte*, for the reasons before stated, is still open to the applicant, in my opinion, unless the subsequent motion which was made by him, and the hearing which was then given to him on the merits, have waived it.

Had the application in question such an operation ?

The summons which Dr. Allen obtained was for the purpose of setting aside the order of the 3rd of July, because, among other grounds, "it had been made without

notice to him, and without any opportunity of being heard against it." The objection having been taken and overruled cannot conclude Dr. Allen from raising it now.

He might properly apply to the learned Judge to reconsider his own order; he was obliged to do so: *Day v. Vinson*, 9 L. T. N. S. 654; and because he did so, he is not to be concluded by the judgment pronounced. He may still move against the original order.

Then it was contended that Mrs. Allen shewed no case for an *ex parte* order, nor for an order for removal of the children at all.

I think her case was not one for an *ex parte* order. She shewed no urgency or necessity for asking a departure from the general mode of judicial procedure.

Was it one which was sufficient, even if it had been founded upon a summons to shew cause, to justify the taking of the children from the father? The petition stated she had been forbidden her husband's house without any sufficient reason. She did not state what the reason was, though by her affidavits filed in answer to her husband's application to rescind the order, she shews what it was. She also stated she had delayed making the application for her children for about six weeks from the time she had been separated from them, because she had been induced to believe her husband would have given up the children, and she feared he would not give them unless he were obliged to do so by the Court.

Her husband in his affidavit stated that the cause of his wife leaving his house was that she had given evidence against him in a suit in which he was plaintiff against her father for defamation, in charging him with the offence before referred to, and which had been tried just shortly before she left the house, and that he had told her after the trial, and in consequence of the evidence she had given against him, he could no longer reside in the same house with her. And he further stated that it was then agreed upon, between them that she should take her eldest daughter Maude, and leave the two younger children with him,

and he would provide for her and her daughter, and that this agreement was carried out on his part.

Mrs. Allen, in her affidavit in answer, does not deny the cause of disagreement being such as her husband had stated, nor does she deny the agreement as to separation and a separate maintenance for herself and child, nor that the two younger children were to remain with their father; and she admitted he had fulfilled his part as to the maintenance.

She admits that by the agreement she selected Maude, her eldest daughter, to live with her; but she says there was no promise that it was to be a permanent arrangement: that she was advised however to accept it as a mere *interim* arrangement, on the assurance that she could get the other children in a few days, and it was only on that assurance and on that belief that she at all acceded to this temporary expedient, and without any intention of abandoning her rights to the other two children.

It is plain therefore that Mrs. Allen did not state the actual facts of the case at first, as she should have done. She knew the cause of her having been forbidden the house, and she should have stated it; and if she left it under any kind of agreement with her husband as to her separate maintenance, and as to the division of the children between them, she should have stated that also. It may be she was not bound by it, and do doubt she did not consider she was. And it is probable, though her husband thought she was agreeing absolutely, and though she may have led him to think so, yet all the while it was, as she says, on her part, "a mere temporary expedient, without any idea of abandoning her rights to the children," which made her accede to the proposal made to her.

But she should have stated all these facts to the Judge; for by not stating them she has not disclosed the true case to him. He might have declined to make the order at all if she had made this full statement. It is perhaps quite certain it would not have been made *ex parte*.

The rule is to submit the whole case to the Court or Judge,

upon which the Court or Judge is asked to decide. So strongly is this maintained that a second application will almost universally be refused when the first application has failed from want of proper materials having been brought forward: *Leggo v. Young*, 17 C. B. 549; *Levi v. Coyle*, 7 Jur. 724; *Regina v. Pickles*, 6 Jur. 1039; *Regina v. Inhabitants of Barton*, 9 Dowl. 1021; *Regina v. Manchester, &c., R. W. Co.*, 8 A. & E. 413; *Re Butler and Masters*, 13 Q. B. 341.

The reason which has been given in the petition why the husband should not have the care of his children is, that "if for no other reason than that he is Mayor of Cornwall, and is more or less occupied with his public duties, he is incompetent and unfit to have the care of them."

It is of course a very unsatisfactory and unconvincing reason, to say the least of it. Upon such a hypothetical statement, if held sufficient, there is not a father in the Province who might not be deprived of his children without a moment's warning. If the petitioner had any other reason, as she certainly had from what subsequently appeared, and as she perhaps intended to intimate under the expression "if for no other reason," she should have stated it for the information of the learned Judge, for he is to draw his conclusion from the facts and circumstances which are or should be detailed, and he is not to take the conclusions which are arrived at by others from what they may know but do not disclose, and which may be very erroneous and unwarrantable.

In *Ley v. McDonald*, 2 Grant 398, the Chancellor said, "Those who apply for an *ex parte* injunction come under a contract with the Court, as it has been expressed, to present a full and fair statement of the facts of the case * * The party is bound to bring forward, not only the facts which he thinks to be material, but such as are in truth material to the determination of the application."

That language is as applicable to other *ex parte* proceedings as it is in applications for injunctions.

The case of *McMaster v. Callaway*, 6 Grant 577, shews

the injunction will be dissolved if the party fail in the above respects, although he did not consider the circumstances not disclosed to be material to his case.

In *Dalglisk v. Jarvie*, 2 MacN. & G. 243, the suppression of a material fact is said to be a fraud on the Court.

In *De Feuchères v. Dawes*, 11 Beav. 46, the injunction was dissolved because of the concealment of material facts, though there were ample merits to sustain it, and the party was left to make an independent application.

In *Clifton v. Robinson*, 16 Beav. 355, the injunction was dissolved for not stating a material fact, and with costs, though the party swore he had forgotten the fact.

In *Re Winterbottom*, 15 Beav. 80, an order of course to tax, obtained after the bills had been paid, by suppressing material facts on applying for the order, was discharged with costs. The Master of the Rolls said: "Admitting that the clients may be entitled to a special order upon a special application, I must follow the practice of Lord Langdale, who, pointing out the analogy between orders of course and *ex parte* injunctions, discharged all orders of course obtained upon a suppression of any material facts, even though it should appear, upon the motion to discharge it, that the party would be entitled to the order on a special application." *Re Hinton*, 15 Beav. 192, and *Re Gedye*, 15 Beav. 254, are to the like effect.

The rule is the same at law as it is in equity, that the party must come to the Court with a full case, and if he fail on that ground he will not, unless in the case of a prisoner or some other excepted case, be allowed to renew his motion. The authorities on this point have been already stated.

In my opinion the order should not have been granted, because the petitioner did not make a true case or full case, and because she suppressed several matters material to be known, and which were subsequently brought out.

I do not say, nor do I suppose, that was done from any ill design or wrongful purpose. On the contrary, I think it was done with a view, to some extent, of not disclosing

more of the unfortunate difficulty between the parties than was considered to be absolutely required to be shewn; and yet a fuller and truer case could have been stated without such a disclosure.

The parties had separated, making a special arrangement respecting the custody of the children. That agreement was carried out. The father was taking proper care of those children which were left with him by the agreement; and his marital duty and the interests of the children could have been secured consistently with his retaining the custody of the children.

In *Hamilton v. Hector*, Weekly Notes, 8th July, 1871, p. 157, the Master of the Rolls said, "the general policy of the law with reference to father and child was not altered by recent legislation, except in the special cases provided for by the Divorce Act: that in the present case there was no evidence that the father was unfit to have the control over his children, which was the only ground for the interference of the Court." And this view was maintained by the Lord Chancellor in Appeal: Weekly Notes, 22nd July, 1871, p. 168 (a), although he overruled the decision of the Master of the Rolls in one respect, as to the father's rights under the provisions of a deed he had entered into.

It is not required that the wife should be living apart from her husband in a manner strictly justifiable in law, or that she should have obtained or be entitled to obtain a divorce *a mensâ et thoro*, to induce the Court to interfere in her favour under the statute: *Ex parte Bartlett*, 2 Coll. C. C. 661. The Court will, however, determine with which parent it will be better to leave the children, the wife being at liberty to assert her rights as a wife without the risk of injury to her feelings as a mother: *Warde v. Warde*, 2 Phill. 786.

The statute controls the paternal rights; but if his marital duty and the interests of the child can be secured

(a) Now reported in L. R. 6 Ch. App. 701.

consistently with his retaining the custody of his children, his common law rights will not be interfered with: *Re Halliday's Estate*, 17 Jur. 56.

The Court, it is even said, will not remove the child from either parent merely because it would be for the benefit of the child; and the father is not to be deprived of them though separated from his wife for cruelty by a judicial order, so long as he conducts himself properly towards them: *Curtis v. Curtis*, 5 Jur. N. S. 1147. That was not a case, however, under the 2 & 3 Vic., ch. 54, but under the general jurisdiction of the Court of Chancery. It may be different when the application is under that statute: *Marsh v. Marsh*, 5 Jur. N. S. 46.

An application for the continuance of the custody of a child with the mother is within the equity of the Act: *Re Tomlinson*, 3 De G. & Sm. 371. The cases of *Stacey v. Stacey*, 29 L. J. Mat. Cas. 63; *Cooke v. Cooke*, 32 L. J. Mat. Cas. 180; *Cartledge v. Cartledge*, 31 L. J. Mat. Cas. 85; *Re Winscom*, 11 Jur. N. S. 297; and *March v. March*, L. R. 1 P. & D. 437, may also be referred to.

I am further of the opinion that a case was not properly made out by the wife on the additional allegations and facts which were made and brought to notice in resisting the application of the husband to set aside the order of the 3rd of July, 1869.

The charges which were made by the wife against the husband, as to his ill-usage of herself, and his neglect of and bad teaching of the children, were not quite sustained. The husband has not been allowed, it was said, to answer the charges so made, but he has in his affidavits, to which those of the wife are an answer, stated matters which, if true, shew there was no neglect or bad teaching of the children, and that his conduct towards his wife, as she represents it to have been, must be considered with reference to his account of her in their domestic relation.

His affidavits in reply, which it is said were not received, proposed to answer the charges which had been made against himself, and to aggravate those he had made in

his first affidavits against his wife. As it is said they were not received, they have not been considered.

The deed of 1852, which was also filed by the wife, cannot, I think, be given effect to in 1869, for the purpose of shewing that children born since the deed was made by a cohabitation continued generally for the whole of the time between these years, should not be permitted to be in the father's custody. Such a lengthened cohabitation as man and wife, and the birth of children the result of that cohabitation, must, so far as it is possible for the rule of condonation to apply, be held between these parties to have been a remission and forgiveness of almost any offence. If he were fit to be her husband and the father of her children, he was fit to have the custody of the children, unless he had by some later act forfeited his parental right. That forfeiture I do not see has been sufficiently established.

Dr. Allen then complains he was not fully heard: that the affidavits just mentioned of his, in reply to those of his wife on his application to rescind the *ex parte* order, were rejected on the ground that they were part of his original case. And he also complains that the *ex parte* order was maintained, not upon the case originally made by the petitioner, but upon the affidavits which she filed against her husband's motion to rescind the order, and which affidavits of hers stood uncontradicted, because he was not allowed to answer them.

The original case, as before stated, merely set forth that Dr. Allen had forbidden the petitioner from remaining longer in his house, without any sufficient reason, and then that he was unfit to have the care of the children, if for no other reason than that he was Mayor of Cornwall, and was more or less occupied with his public duties. These facts are denied by Dr. Allen, so that the case was fully answered.

In his affidavit he states the reason he forbade her his house: namely, because she gave evidence against him on the trial before mentioned, which he says was false, and and that she was thereby perjured. Then he charges

her with absence from his house before she finally left it, nearly all day long for several months, and remaining absent until very late at night; and also with calling him at all times, and often when she returned home at night and he was in bed, abusive names, and threatening to beggar him, and that he would be in the Penitentiary yet, and speaking of him to the servants and others in the same way, and with the neglect of her house and children. There are seven affidavits of this nature.

Dr. Allen also filed supplemental affidavits, charging his wife with habits of intemperance, and also with attempting by bribery to fasten on her husband the offence of adultery.

The affidavits which were filed in answer to these rebutted the criminatory charges, and retorted the ill language, bad treatment, and harsh usage, upon the husband.

The learned Judge refused to allow Dr. Allen to reply to these affidavits, as in his opinion they introduced no new matter material to the decision.

Such affidavits were admitted in the case *In re Taylor*, 11 Sim. 178.

I am not prepared to say the learned Judge was wrong; on the contrary, he may have exercised his discretion wisely. The applicant did not content himself with answering his wife's original case. He followed it up with charges of ill language and gross neglect of her duties as a wife, mother, and mistress of a household; and these imputations, which she repelled, he proposed to corroborate and add to by others, and also to exculpate himself from her charges.

I think I should, in a case of this nature, when the question was not alone between the two litigants, but chiefly concerned their infant children, and their present and future welfare, have received all the information that it was possible to receive, to have enabled me to decide satisfactorily in whose custody it would be proper to place them. Perhaps also Dr. Allen should have been allowed

to reply to the new charges made by his wife against him. The result shews that all the crimination and recrimination which have been made and asserted, have been denied and repelled, as is usual in such cases, by the principal parties. And we are obliged at last to look at the strict facts, and say whether a good case was originally made or not for an *ex parte* order.

The affidavits disclose a most unhappy state of feeling between these parties, who were so well calculated to make each other happy, and to bring up their children with all the advantages of their parents' united attention and love. It should not be impossible to bring about a reconciliation still.

The first charge against the husband should be considered to have been substantially decided in his favour by the late verdict (a). And it should be a pleasure to him to know that his wife has been spoken of in a manner suitable to a lady of her education, position, and connection, by so many honourable and influential persons, who have known her long, and who know her well.

There is much in the numerous affidavits and documents filed which leads one to suppose that the wife has not been treated with that consideration and regard which she was entitled to receive from her husband, and that much if not all of the unhappiness which his mother spoke of, and endeavoured to remove from between them many years ago, but which has greatly increased since then, can be traced to his conduct, to that want of gentleness, attention, and, if necessary, forbearance on his part, which were her due, and which he could with kindness and generosity have given without offence to his own feelings as a man, and without the least derogation of his rights as a husband.

(a) The verdict in an action of slander brought by the husband against his father-in-law for charging him with the crime alluded to on p. 464. On the first trial, in 1869, there was a plea of justification on the record, the wife was called as a witness for the defendant, without objection, and the jury did not agree. On the last trial the verdict was for the plaintiff, for \$25, upon a plea of not guilty. The 33 Vic., ch. 13 O., rendered the wife incompetent as a witness, and the plea of justification was withdrawn.

While I say this, I must still say a true, full, and sufficient case was not made by the petitioner for the removal of the children in the summary manner in which it was done, and I think was not at any time made by the subsequent proceedings, even if they could be used in aid of the originally defective case.

I must also say that it is impossible to look at these proceedings without being convinced that the learned Judge before whom they were initiated and carried on has taken extraordinary pains and trouble to settle the rights of the parties in the manner which seemed to him just, upon a very careful consideration of the whole of the family circumstances, and with a view to the welfare of the children.

That I have the misfortune to differ from him in some essential particulars is what must occasionally happen when two minds are required to decide on the same subject. I have felt it necessary to justify that difference at some length in the reasons which I have given.

I am now to consider whether the order directing Dr. Allen to be committed for contempt was regularly made.

Dr. Allen's application of the 12th of July to rescind the order of the 3rd of that month, was discharged on the 20th of August. An order of that date was drawn up, and served on Dr. Allen on the 21st of August.

On the same day, a copy of the appointment of Mr. Sedgewick, by Mrs. Allen, to demand the children of him, and a copy of the order of the 3rd of July, were served on Dr. Allen, and a demand made on him for the children.

Whether the last services and demand were made on Dr. Allen before or after he was served with the order of the 20th of August, dismissing his application for relief, does not appear, though Dr. Allen says he was informed in the afternoon of the 20th of August, in Montreal, that his application had failed. I incline to think it should have been shewn by the one desiring to bring another into contempt, that the service of the order dismissing the application had been made before the demand of the children was made; and I incline to think that it has not

been sufficiently shewn that the children were not given up by Dr. Allen to Sedgewick.

Afterwards, on the 23rd of August, the summons on Dr. Allen to shew cause why he should not be committed for contempt was issued. It was served in Cornwall on the morning of the 24th, and he had to shew cause at two o'clock in the afternoon, the first day after service. The summons was afterwards enlarged, and finally disposed of.

Excepting the informalities just mentioned, and that Dr. Allen should not have been called on to shew cause on the first day after service, at Osgoode Hall, nearly three hundred miles from his residence at Cornwall, where he was served, I do not see anything irregular or unwarranted in the proceedings taken against him.

It would not have been reasonable to have ordered Dr. Allen, at half-past two in the afternoon of the day after the service was made on him at Cornwall, to be committed for contempt, if he had not appeared at all. The time was certainly too short. But all that has been cured by appearance to the summons.

Dr. Allen was rightly held in contempt, if the previous proceedings can be supported.

The next question is, whether the process for contempt which issued, a writ of attachment from the Clerk of the Process, and under the Process Seal, was the proper process to be issued, or whether Mr. Justice Morrison, who had directed Dr. Allen to be attached, should not have made his own order the process on which to take Dr. Allen for his contempt.

The statute says that "all orders made by the Court or a Judge, by virtue of this Act, shall be enforceable by process of contempt by the Court or Judge by which or by whom such order has been made."

This enactment seems to give the Judge, who has made the order, full authority to grant the necessary process of contempt for disobedience to his order.

By sec. 281 of the C. L. P. Act, if the sheriff or coroner do not return a writ given to him to be executed, "the

Court, in term time, or any Judge * * * in vacation, may order a writ of attachment to issue forthwith against the sheriff or coroner." Sec. 280 is similarly worded.

By these sections the Judge does not grant the attachment himself: "he orders it to issue;" that is, to issue from the office of the Court, or from the Court.

The Judge would make his order for the committal of a debtor who did not attend to be examined, &c., under Consol. Stat. U. C., ch. 24, sec. 41; that is, the committal would be under the order of the Judge only, and not under any writ or other process.

The expression that "there is no contempt in disobeying a Judge's order,"—*Re Turner*, 6 Dowl. 6,—must be understood when the Judge has acted merely as the delegate of the Court, the substitute, not the principal, as in amending an issue: *Baker v. Rye*, 1 Dowl. 689; or in putting off a trial: *Plumb v. Miller*, 5 O. S. 484.

A Judge's order may be moved against, however, though it has not been made a rule of Court: *Clement v. Weaver*, 3 M. & G. 551; *Cassidy v. Stewart*, 2 M. & G. 439, note (a).

The statute declares that the order shall be enforceable by process of contempt by the Judge who made it. The contempt is committed and is treated by the statute as committed to the order itself. No fresh contempt can be required to be committed by the party in default before the process of punishment is issued. It was quite unnecessary, therefore, to make the order a rule of Court for the purpose of bringing about a contempt. If it had been necessary to do so, the rule of Court must have been served and a fresh demand made on Dr. Allen to perform what the order commanded; and the contempt would then have been of the rule, and not of the order. But the statute does not require this; it enacts that the Judge shall, by his own order, attach the party, and I have no doubt the learned Judge could have proceeded in this manner against Dr. Allen.

The question, however, is, whether he might not also

call in aid the process of the Court, if he desired to do so. According to long established usage, a subpoena may issue from the Court of Queen's Bench to compel the attendance of witnesses before magistrates in Petty Sessions, or before the Courts of Assize: *Regina v. Greenaway*, 7 Q. B. 126. Lord Denman, C. J., said: "This Court has in all times lent its aid to inferior tribunals, where they have wanted the means of enforcing the attendance of witnesses."

So the statute authorizes the Judge to direct an attachment to be issued under sec. 281 of the C. L. P. Act; that is, as I understand it, to be issued from the Court. Here it does not. But having power to attach for this contempt of his own process, and acting in his judicial capacity as a member of the Court, may he not direct the process of the Court to be issued to punish that contempt?

The rule, no doubt, is, that the Court does not enforce obedience by attachment to Judge's orders until they have been made rules of the Court, for until then the proceedings of the Judge have not been adopted by the Court: *Wilmot's Opinions*, 264.

If the order had been made a rule of Court, I think it would not have been necessary to have made service of the rule and a new demand on Dr. Allen. He was already by the statute in contempt of a judicial proceeding, and such a contempt the Court certainly, on the order being made a rule of the Court, and without service of that rule so as to create a new contempt, could punish.

If it were necessary, before issuing the process from the Court, that the proceedings should have been transferred to and adopted by the Court, that was not done. I think, as I have said, it was not necessary to remove the proceedings into Court for the purpose of bringing the party into contempt to the Court. He was already in contempt of judicial proceedings by the statute, and already subject to punishment.

But I think it was necessary the proceedings should have been moved into and adopted by the Court before the attachment could be issued by it for the contempt shewn to the Judge.

If it had not been said how the process should have been awarded, but it had been enacted generally that process of attachment should be issued or be directed to be issued, that would probably mean that it should be issued from the Court, for Judges do not usually issue such process, and it would issue from the Court from necessity. That does not apply here, for generally proceeding in Chambers are not in Court; they must be specially transferred if they are to be acted on in Court, as much of the argument in this case shews; and the learned Judge had express authority to award the necessary process himself. I think, therefore, the process having issued direct from the Court without any rule for that purpose, was not regularly issued.

It becomes, then, quite unnecessary to determine whether the process, if it had issued rightly from the Court, should have been signed and sealed by the Master of this Court, or by the Clerk of the Process. But we may state our opinion on the point, as it is a question of very great practical importance, and because it was strongly contested in this case.

The sections of the Statutes to be considered in connection with the decisions upon them are as follows: Consol. Stat. U. C. ch. 10 sec. 24, provides that a Clerk of the Crown and Pleas shall be appointed to each of the Courts of Queen's Bench and Common Pleas, "and to both of the said Courts jointly a Clerk of the Process."

Sec. 35. "The Clerk of the Process shall have a separate seal for sealing writs in each of the said Courts * * and he shall seal therewith and sign all writs and process issued from such Courts respectively."

Sec. 36. "The Clerk of the Process shall keep each Deputy Clerk of the Crown and Pleas supplied with blank writs and process of all descriptions sealed and signed by him, and to be filled up and issued by them; and he shall in like manner keep the Clerks of the Crown and Pleas supplied with all writs and process other than those which he is himself required to issue; and he shall have a reasonable

allowance for printing, procuring, and transmitting blank forms of writs and process, and for necessary books and stationery."

And by secs. 39 and 40 he is required to issue all writs and process which are issued in matters in either of the Courts at Toronto.

The C. L. P. A. ch. 22, sec. 4, enacts, by sub-sec. 1, that "in the Superior Courts the Clerk of the Process shall issue to the parties or their attorneys all original and other writs of summons and of *capias*, and all writs of *replevin* issued respectively from the principal office at Toronto, and shall renew such writs, except writs of *capias*, as hereinafter authorized."

Sub-sec. 2. "And the Clerk of the Process and each Deputy Clerk of the Crown shall issue writs for the commencement of actions," &c.

Sub-sec. 3. "In the Superior Courts such writs shall be issued alternately, one from each of such Courts, and not otherwise, but this shall not affect the issue of concurrent writs."

Sec. 5. All writs issued in the Superior Courts shall be tested, &c.

Sec. 6. "The Process Clerk, and each Deputy Clerk of the Crown, shall note in the margin of every writ issued by him from what office and in what county the writ issued, and shall subscribe his name thereto."

In *Burdett v. Sawyer*, 2 P. R. 398, Mr. Justice Burns decided that a writ of *mandamus nisi* signed and sealed by the Clerk of the Process was properly issued; the 19 Vic. ch. 43 sec. 4, providing that the Clerk of the Process "shall sign and seal all writs and process whatsoever."

In *Wakefield v. Bruce*, 5 P. R. 77, it was decided that a writ of attachment against an absconding debtor issued in this County by the Clerk of the Process was regularly issued: that the Attachment Act gave no direction from what office the writ was to be issued: that the C. L. P. Act provided that all writs of summons should issue from the Clerk of the Process; and that the memorandum in the margin of

the form of writ given in the Attachment Act, "issued from the office of the Clerk of the Crown and Pleas," did not mean that the writ should be signed and sealed by the Clerk of the Crown: that the provisions of the Attachment Act, ch. 25, having been embodied in the C. L. P. Act 19 Vic. ch. 43, and having been separated from it by consolidation, did not necessarily make it independent of the C. L. P. Act ch. 22, in matters on which ch. 25 made no provision; and that the rule 150 of T. T. 1856, was still to be considered in deciding the question.

The officer appointed is a Clerk of the Process.

"Process" is largely taken for all the proceedings in any action or prosecution from the beginning to the end. It is called so also because it is by it that the party is called into a temporal Court, and it is the beginning or the principal part by which the rest of the proceedings are directed.

Taken strictly it is the proceeding after the original writ: *Jacobs' Law Dic.* "Process."

Sec. 4 of the C. L. P. Act and its sub-sections appear to me to apply to those writs which are the commencement of the action, and to writs of *capias* which are issued pending the suit, though not plainly expressed, as it is in 19 Vic. ch. 43, sec. 4.

The provision that *such writs* are to be issued alternately, one from each of the Superior Courts, shews also that the enactment applies only to writs which are the beginning of actions. Strictly speaking this does not apply to writs of *capias* issued pending a suit, reading sub-sec. 1 with the aid of the original sec. 4 of the Act of 1856. But with that exception as to writs of *capias* issued pending a suit, and which must of course be issued from the Court in which the action is pending, without regard to the Court from which the previous writ issued, the enactments in sec. 4 of the C. L. P. Act apply to writs which are the commencement of suits.

The Deputy Clerks of the Crown issue all writs for the commencement of actions in the outer counties: the Clerk of Process issues all such writs for the County of York.

My reading of the Statutes is as follows: The Clerk of the Process is to seal and sign all writs and process issued from the Courts: Ch. 10, sec. 35.

He is himself to issue all writs for the commencement of actions and writs of *capias* issued pending the action, which are issued from the principal office at Toronto: Ch. 10, secs. 39, 40; ch. 22, sec. 4, sub-sec. 1.

He is to keep each Deputy Clerk of the Crown and Pleas supplied with blank writs and process of all descriptions, sealed and signed by him, and to be filled up and issued by them: ch. 10, sec. 36.

He and the deputies are to issue writs for the commencement of actions: he in the County of York, and the deputies in their respective counties. And such writs are to be issued alternately, one from each Court: Ch. 22, subsecs. 2, 3.

And he is to keep the Clerks of the Crown and Pleas "supplied in like manner with all writs and process," (*whatever* by 19 Vic. ch. 43, sec. 4) "other than those which he himself is required to issue": Ch. 10, sec. 36.

The Clerk of the Process then signs and seals writs and process of *all descriptions*. He issues those for the commencement of actions, or writs of *capias* issued pending the action, for the County of York. The deputies (he supplying them therewith) issue writs and process of all descriptions for the outer counties; and he supplies the Clerks of the Crown with all *other writs* which he, the Clerk of the Process, does not himself issue, and they issue them; and he is to "have a reasonable allowance for printing, procuring, and transmitting blank forms of writs and process, and for necessary books and stationery."

The writ in this case was therefore properly signed and sealed by him, and was properly issued by the Clerk of the Crown, so far as the mere question relates as to which of them (assuming all other things to have been properly observed) should have signed and sealed the writ.

I have no doubt that it is the duty of the Clerk of the Process,—who is rightly described, taking the

term "process" in its larger sense,—to sign and seal all writs and process for the commencement of actions, all writs of *capias*, and of attachments pending actions, all writs of *venire facias*, or for a view, all writs of prohibition, injunction, and mandamus, all writs of *subpoena*, all writs of execution and revivor, and all writs of *habeas corpus*, *certiorari*, and attachments for contempt: that is to say, he is to sign and seal "*all writs and process issued from the Courts*;" that is, all writs and process *whatever*, or, as it is also expressed, writs and process *of all descriptions*. No stronger language could have been used to express the declaration of the Legislature that no other officer than the Clerk of the Process should sign and seal every writ and process issued from the Courts.

Having gone through the various points raised for decision, I cannot avoid saying that the immediate cause of difficulty which has given rise to the present proceedings was occasioned by Mrs. Allen giving testimony in the action of her husband against her father, for and on behalf of her father, adversely to her husband.

That she might have given such testimony by consent of parties and of the presiding Judge need not be questioned; but it is to be regretted that such consent was ever asked, as I presume it must have been, by the defendant.

In *Barbat v. Allen*, 7 Ex. 609, in an ordinary action of *assumpsit*, the Chief Baron refused to admit the wife as a witness, although the parties assented to it. The precedent might have been most beneficially followed in such an action and for such a purpose as that for which Mrs. Allen was called upon to testify.

I think the rules should be made absolute setting aside the several Judge's orders before mentioned, and the writ of attachment, and generally all proceedings had in these matters between these parties.

MORRISON, J.—After a careful re-consideration of this case, I am of opinion that the rule should be discharged.

I do not think it necessary to consider the preliminary objections taken to the motion, except to say that my present opinion is that the materials upon which this application is made are not properly before this Court, not being proceedings in any cause in this Court, nor in any matter before a Judge of the Court in Chambers, or in which this Court has jurisdiction to interfere on a motion of this nature; and I wish to guard myself against acquiescing in any view that the proceedings are regularly before us.

I retain the opinion I held when the matter was before me while acting under the Statute, and on the application made by Dr. Allen to rescind the order now moved against. I still think I exercised a proper discretion in making the order, as well as in declining to rescind it. On the latter application I went fully into the merits of the case, after a most anxious and painful investigation, and as to the merits I shall only refer generally to the judgment I then gave.

The preamble of the Statute, ch. 126, 18 Vic., which is consolidated in ch. 74, Consol. Stat. U. C. stated, "Whereas it is desirable that the law relating to the custody of infant children shall be so amended as to enable the Judges of the Superior Courts of Law or Equity in Upper Canada to give the custody of such children to their mothers, in certain cases"; and it enacted that it should be lawful for any of the Superior Courts of Law or Equity in Upper Canada, or for any Judge of either of such Courts, upon hearing the petition of the mother of any infant being in the sole custody or control of the father thereof, &c., if such Court or Judge shall see fit * * to make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant shall attain the age of twelve years, subject to such regulations as such Court or Judge shall direct, and also to make order for the maintenance, &c.

The Statute gives power to the Court or Judge to compel the attendance of any person, &c., and authorizes the

Court or Judge to enforce those orders by process of contempt by the Court or Judge by whom the order is made. The words of the Statute are distinct, plain and clear, giving the same full and independent authority to any Court or any Judge; and in my judgment the Statute authorizes, and was intended to authorize any one of those Judges, if he saw fit to act summarily in the matter, to make any of the orders mentioned in the Statute upon hearing the petition of the mother *ex parte*. If the Judge or Court had not that power, it is obvious that in many cases, if it was required previous to hearing the petition that the father, &c., should have notice of the application, the result would be that the parties, without offering any opposition to the same, would in the meantime, before the order could be had, remove the infant from the Province and without the jurisdiction of the Judge, or change the custody of the child.

It was contended that supposing in some cases an *ex parte* order might be made, that to justify a Judge doing so, a case of necessity should be made out; but even were it so, it is also in my opinion for the Judge to determine whether such a case is made out. I need hardly remark that it frequently happens on an application to a Judge, there are matters and circumstances quite apparent, and which do not appear on the affidavits or papers before him, and which have a material bearing on the case, and operate on the mind of the Judge. In this case, when the petition was presented, I suggested the propriety of notice of the application being given to Dr. Allen. It was then very strongly urged by the petitioner's counsel that if such a step were taken the infants would be removed beyond my jurisdiction by Dr. Allen (as they could be in a few minutes, from the contiguity of the place of the father's residence to the United States.) I felt the force of the argument and after intimating to the petitioner's counsel that I would on Dr. Allen's application, stay proceedings under the order, and afford him an opportunity of moving to rescind it, I made the order without any provision as to main-

tenance, and making it a condition that the mother should keep the infants within the jurisdiction, and from time to time send the infants to visit and see Dr. Allen, if he wished it. The apprehension of the probability of the removal of the children if Dr. Allen had been notified of the application, was fully borne out by his subsequent conduct in conniving at the removal of the infants, through the agency of others, into the United States. If therefore a case of necessity ought to appear to justify an *ex parte* order, such a case was made out to my satisfaction.

But irrespective of these considerations, I retain the opinion, as stated in my judgment upon refusing the application to rescind the order, that the statute confers upon the Judge absolute jurisdiction as to the custody of the infants. The Legislature did not think it necessary or expedient to limit the authority of the Judge to any particular cases, or to prevent any mother, except those against whom adultery had been established in an action of *crim. con.*, from petitioning for, and obtaining the custody of her infant children within the age of twelve years. In this case the infants were of the respective ages of three and six years, and there is not the slightest imputation against the mother's virtue or chastity. In my opinion the object and intention of the Legislature was, not to restrict the Judge in any case where the children were under twelve years and the mother not within the 11th section, but to leave the Judge untrammelled by any previous principle of law or equity. Our statute was apparently taken from the Imperial Act, 2 & 3 Vic., ch. 54, the preamble to our statute being more extended, and our Legislature giving the power to persons Judges of the Common Law Courts, and with a power, not in the English Act, to make order for the maintenance of the children by the father.

In the case of *Warde v. Warde*, 2 Phill. 786, which was an application under the 2 & 3 Vic., ch. 54, the Lord Chancellor (Cottenham) says: "The object of the Act, and of the promoters of it, and that which I think appears on the

face of the Act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave to him of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. That was the object with which the Act was introduced, and that is the construction to be put upon it. It gives the Court the power of interfering; and when the Court sees that the maternal feelings are tortured for the purpose of obtaining anything like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere. When the parties, therefore, are considering the suggestion which I have thrown out, I wish them to bear in mind that this is not, as was the case in *Wellesley v. The Duke of Beaufort*, 2 Russ. 1, a question merely as to the general jurisdiction of this Court to interfere with the legal rights of the father; but that I have now an absolute authority over the children under seven years of age." He further said, "Children are by nature entitled to the care of both their parents, but when the conduct of one or both of the parents has been such as to render it impossible that they can live together, and the Court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, all that it can do is to adopt that course which seems best for the interests of the children, without regard, so far as it interferes with that object, to the pain which may be inflicted on those who are the authors of the difficulty." Again, "As to the other children who are under seven years of age, the Court has an absolute control over them, without regard to the peculiar Common Law right of the

father to the custody of all his children. I think that is the true construction of the Act."

Such is the clear view entertained by Lord Cottenham of the Imperial Act. Our statute, in my judgment, goes even further. It is unrestricted in its operations in all cases within its provisions, leaving the decision of each particular application wholly in the discretion of the Judge. Happily, in the interests of humanity, our Legislature has broken in upon the Common Law principles which deprived the wife of nearly every right, and among others the right to look after her infant children, "adopting" (as Mr. Macpherson, in his treatise on Infants, ch. 16, remarks) "the opinion that those rights fell short of what natural feeling and public policy demanded," principles which sprung from a state of society quite different from that of the present day, and under cover of which much injustice and heart-rending cruelty was perpetrated. The interests of such infants are now fortunately within the protection of all the Courts, and Judges, as such, separate from the Courts, so that in the case of a father living separate from his wife, his rights are only conditional as against the mother, I may say only concurrent; and that if upon the petition it shall appear to be for the general benefit and interests of the infant that it should be withdrawn from the custody of the father, it can be so ordered until it arrives at the age of twelve years, if the Judge to whom the petition is presented shall see fit, and upon such conditions as may be considered reasonable. The main grounds upon which such an order should be based being the living apart of the wife by compulsion of her husband, and her purity of life being unimpeached.

I am also of opinion that the Statute conferred an independent concurrent jurisdiction on every one of the Judges of the Superior Courts, *sui juris*, not as subordinate to any of those Courts or the particular Court of which the acting Judge is a member, the Legislature conferring it on the individual who happened to hold the office of a Judge in any of those Courts (and for the purposes of this appli-

cation the Statute should be read and considered as if it omitted in the text giving jurisdiction to the Superior Courts). The jurisdiction is a new and original one, to be exercised summarily on petition, leaving the exercise of the power entirely in the discretion of the Judge who may hear the petition; making no provision for appeal from or review of the Judge's order, and, as we may fairly assume, for the reason that the exercise of the power rested in mere discretion.

I therefore see no ground for holding, in the absence of any express provision, that this Court, or any of the Courts, has authority by implication to review the decision or order of any Judge acting under this Statute. To hold that this Court can control the Judge's discretion would be to legislate, and add a provision to the Statute which it does not contain.

The authorities referred to on the argument as to the practice of this Court in reviewing the orders of single Judges do not in my opinion touch this case. I fail to see any analogy between those cases and the one before us. This is not an application to review any proceeding or order in a cause in this Court, or against the order of a Judge sitting in Chambers, in the ordinary sense, or the decision of a Judge acting in the place of or auxiliary to this Court. It is an application to set aside the adjudication of a Judge made in an original proceeding, upon the hearing of a petition before him under the provisions of a Statute giving the Judge a separate and independent jurisdiction, just as if the Statute conferred it on one Judge only by the designation of his office—for example, the Chancellor of Ontario. In that case it would hardly be contended that this Court could review his decision upon a motion of this nature. If the authority in this Court to review a Judge's decision under this Statute exists by reason of the Courts as well as the Judges having concurrent jurisdiction, then it seems to me that the Court of Common Pleas might have entertained this motion, and this Court would have authority to review the discretion of one of the Vice-Chancellors.

If the authority of the Court to entertain this application rests upon its general jurisdiction to review the decision of a Judge acting under a special jurisdiction conferred on him as a Judge, then, in that case, such Judge should have been called upon to shew cause why his order should not be rescinded or reversed, &c. It seems to me, should a Judge acting under this Statute exercise the jurisdiction in an illegal or unauthorized manner, or should an infant be removed into the custody of its mother by an order improperly made, or containing unauthorized or unreasonable conditions, I take it this Court would, upon the application of the father, grant a writ of *habeas corpus* to bring up the body of the infant, and enquire into the validity of its removal and detention, but I see no jurisdiction in this Court for reviewing, on a motion of this nature, an order made by a Judge under the authority of the Statute in question. There are and may be many cases where powers are given to particular Judges by Statute, against whose decision there is no jurisdiction in any Court to entertain a motion to revise a Judge's decision. See *In re Corbett*, 4 H. & N. 452, and *Beswick v. Boffey*, 9 Ex. 318, as instances.

But granting that this Court has authority to review and rescind the order appealed against, yet it seems to me, assuming that the Judge was in error in hearing and adjudicating on the petition *ex parte*, and in making the order he did, nevertheless as Dr. Allen came in and made an application, which was granted him, to rescind the order before it was acted on, and had all proceedings stayed under it, and having then proceeded to make out a case on the merits, and shewing cause why the Judge should not have made the order, and both Mr. and Mrs. Allen having fully entered into the causes and circumstances which caused and led to their separation, and the proper custody of their infants during their tender years, (about 100 affidavits on both sides being filed,) and upon a full investigation and hearing the counsel for both parties the Judge was of opinion that the children should be delivered to the custody of the mother upon the terms before mentioned, on this re-

hearing of the petition Dr. Allen was to all intents and purposes in the same position, and had all the benefit and advantage which he would have had if he had received notice of his wife's application in the first instance, and could not be and was not in any possible way or manner prejudiced. The Judge, it is true, might have *pro forma* set aside his *ex parte* order of the 3rd of July, and immediately after, or at the same time, made a new order on hearing both parties; and unless the majority of the Court are of opinion that on reading all the affidavits that were before the Judge, and considering all the circumstances and the object and provisions of the Statute, that a case was not made out to authorize a Judge in his discretion to interfere under the Statute, it seems to me that on this ground alone the rule should be discharged. To make the rule absolute on purely technical grounds would only in effect send the matter back to the Judge for adjudication. For these reasons, as well as the grounds stated in my judgment on the rehearing, I think this rule should be discharged.

RICHARDS, C. J.—I have had the opportunity of seeing the able judgments of both my brothers in this matter, and, though I cannot say that the case is free from doubt, I think, from the best consideration I can give the subject, that this Court has the right to review the decision of the learned Judge made under the Statute referred to.

I think this view of the case most consistent with reason and authority. The decided cases seem to shew that the full Court exercises this power when it is not expressly taken away, or when it does not appear from the terms of the enactment, and the nature of the duty to be discharged by the Judge, that it was the intention of the Legislature that the decision of the Judge should be final.

In a matter which has always been considered so important as depriving a father of the custody of his own children, and the hesitation with which the Judges have exercised that power, induces me to favor the view that, if the Legis-

lature had intended that the general power of the Court to revise the decision of one of its Judges sitting alone should not be exercised in these cases, they would have so declared it in the Statute.

It seems reasonable that such a power should exist in so delicate a matter, and I do not think we should decide against it unless it clearly appear by reasonable intendment, or has been held by express authority, that it is not possessed by the Court.

The only case in which there was an appeal in England, from the order of the Vice Chancellor to the Chancellor, does not appear to have been objected to on the ground that the decision of the Vice Chancellor was final.

The cases referred to by my brother Wilson as to the right of the Court to review, and those shewing that the proceedings on the part of the petitioner in obtaining the order were not regular, are, I think, sufficient to establish the conclusion at which he arrives, that the order ought not to have been made on the materials then before the Judge, and must therefore be set aside.

Without deciding that a careful consideration of all the affidavits filed, if they had been properly and regularly brought before the Judge, might not lead to the conclusion that a similar order should have been made, yet for the reasons stated by my brother Wilson in his judgment, and the authorities referred to by him, I think the present order cannot be sustained, considering the material on which it was granted and the manner in which the other facts have been brought before him.

I think it sufficient to dispose of the case for the present on this ground, expressing the hope that the parties may by mutual agreement so arrange their difficulties, that their children may grow up to maturity without their being so separated from either of their parents by these unhappy disagreements as to forget the duty they owe to both.

Rule absolute (a).

See *Re Davis*, 3 Chan. Ch. Rep. 277; *In re Leigh*, 5 P. R. 402.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—JAMES CARRUTHERS DONALDSON, DAVID THOMAS DUNCOMBE, WILLIAM McDOWELL, JOHN LAWRENCE LYON, WILLIAM HENRY FULLER, JOHN TAYLOR, JOHN SKIRVING EWART, JOHN CRERAR, WILLIAM HENRY BARTRAM, WILLIAM GLENHOLME FALCONBRIDGE, GEORGE OSCAR ALCORN, GEORGE WASHINGTON BADGEROW, JAMES MUIR, JAMES MASSON.

IN THE COURT OF ERROR AND APPEAL.

WALLACE ET AL. V. SWIFT ET AL.

*Contract to forward goods—Deviation from specified mode of conveyance—
Loss by fire—Remoteness of damage.*

The plaintiffs, living at Southampton, directed goods purchased by them in Montreal to be forwarded to Kingston, to the care of the schooner "Regina." The captain of the "Regina," being unable to wait for their arrival at Kingston, directed defendants, who were forwarders there, to send them on to Hamilton by the mail steamer, and thence by railway to Sarnia, where he would take them up. Defendants, however, shipped them by a propeller, which was burned with them on board in the river St. Clair. They had been insured to go by the "Regina," and the policy was cancelled because of the change.

It was held in the Q. B., Richards, C. J., doubting, that on the contract for not sending as directed, defendants were liable only for nominal damages, the loss by fire being too remote; and, Richards, C. J., dissenting, that they were not liable in trover.

On appeal, *Held*, reversing the judgment, that defendants were liable on the contract for the value of the goods.

APPEAL from the judgment in this case making absolute the rule to reduce the plaintiffs' verdict to 1s., reported in 28 U. C. R. 563. The pleadings and facts are sufficiently stated there, and in the head note to this report.

Harrison, Q. C., for the appellants, the plaintiffs.

Anderson, contra (a).

The arguments were the same as in the Court below. The following additional authorities were cited for the appellants as to the right to recover under the special count: *Smeed v. Foord*, 1 E. & E. 602; *Wilson v. Lancashire and Yorkshire R. W. Co.*, 3 L. T. N. S. 859, 861; *Powell v. Salisbury*, 2 Y. & J. 391; *Gee v. Lancashire and Yorkshire R. W. Co.*, 6 H. & N. 211; *Ellis v. Turner*, 8 T.

(a) Argued on the 30th June, 1870, before DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., MORRISON, J., GWYNNE, J., GALT, J., STRONG, V. C.

R. 531; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 177; *Burton v. Pinkerton*, L. R. 2 Ex. 340; *Glover v. London and South Western R. W. Co.*, L. R. 3 Q. B. 25; *Cory v. Thames Ironworks, &c. Co.*, L. R. 3 Q. B. 181; *Boyd v. Fitt*, 14 Ir. C. L. Rep. 43; *Byrne v. Wilson*, 15 Ir. C. L. Rep. 332; *Davis v. Garrett*, 6 Bing. 716.

[January 12th, 1871,] (a).—DRAPER, C. J. OF APPEAL.—I have considered this case carefully, because there is to my mind a very apparent hardship if the defendants are held liable for the full value of the goods lost on the first count in the declaration. For the only consideration they were, on the plaintiffs' own shewing, entitled to, was a reasonable wharfage and reward for receiving on their wharf in Kingston certain goods of the plaintiffs, and shipping and forwarding the same goods by the mail steamer to Hamilton, from thence to be carried by railway to Sarnia, and then to be shipped on board the schooner "Regina," to be conveyed to the plaintiffs at Southampton.

All that the defendants could claim as a reasonable reward for these services would be no consideration for a liability to be treated as insurers of the goods, if they were forwarded in a different mode from that which the plaintiffs allege in their declaration, and which on the finding of the jury we must assume was proved.

Again, after conferring with my brother Morrison, who tried the cause, I understand that the captain of the "Regina" was the only witness to prove the most important and indispensable part of the plaintiffs' case; that he, as he says, took the responsibility of ordering the goods to be sent as he did order by a written memorandum, which he says he gave to the defendants' clerk, but which was not put in evidence; and that, as is the plain inference from his evidence, he had engaged to receive them at

(a) *Present*—DRAPER, C. J. of Appeal, RICHARDS, C. J., MOWAT, V. C., WILSON, J., GALT, J., STRONG, V. C.

Kingston if they arrived there; and the goods were, he says, addressed to him at Kingston, though he was not under a contract to take them for the plaintiffs. And I gather that the defendants were under a mistaken impression as to the person to whom the captain gave his directions, and had a person in court, who was not, however, as the captain swore, the person to whom he gave the memorandum. And it was only after the question had arisen and been disputed that the captain was asked and swore that the plaintiffs approved of what he had done.

A new trial might have altered the state of facts which went to the jury, and have qualified materially the result.

As the case now stands, we have to treat the plaintiffs as having for a proper consideration engaged the defendants to receive and forward their goods from Kingston to Sarnia by a particular route and mode of transit; and it is manifest that the defendants did not fulfil that engagement, but forwarded the goods by another route and a different mode of transit, and that the goods were lost under circumstances which but for the relation created by the special contract would not have rendered the defendants liable. The loss of the insurance, on which some stress was laid, would have happened if the captain's instructions had been obeyed to the letter, for at least the whole time of the transit from Kingston to Sarnia the goods would not have been carried by the "Regina," as when insured it was assumed they would be. I think the effect of the evidence and finding of the jury is to affirm the relation of principal and agent as to the forwarding of these goods between the plaintiffs and defendants, and the moment that conclusion is adopted, the plaintiffs are, in my opinion, entitled to succeed on the first count.

In such a case the maxim *Causa proxima non remota spectatur* does not apply, though, as is observed in Story on Agency, note to sec. 200, "It is not perhaps easy to state the exact grounds of the distinction. The loss is not, indeed, directly caused by the negligence, but the latter may properly be said to be the occasion of it."

In *Davis v. Garrett*, 6 Bing. 716, the objection taken was in principle precisely that which arises here, and may be thus stated in the present case: there is no natural or necessary connection between the wrong of the defendants in shipping the plaintiffs' goods on board the propeller for Sarnia, instead of sending them by way of Hamilton to the same destination, and the loss which actually took place. Tindal, C. J., replies: "We think the real answer to the objection is, that no wrong doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was actually in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done." It is hardly necessary to add, that if the plaintiffs' goods had been sent by the way of Hamilton they would not have been lost or destroyed when the propeller was burnt in the river St. Clair.

In my view, consequently, the plaintiffs are entitled to recover the value of their goods under the first count.

It is unnecessary, therefore, to determine the question raised as to the second count. In *Tear v. Freebody*, 4 C. B. N. S. at p. 262, Willes, J., is reported to have said: "I apprehend that a person is guilty of a conversion, if he takes away the goods of another for the purpose of depriving that other of the use of them and acquiring the use of them himself." If the converse of that proposition be true, there was no conversion in the present case, for the evidence only inferentially, and less as a matter of fact than of law, shews the former purpose, while it has no tendency whatever to prove the latter. I refer also to *Pillot v. Wilkinson*, 2 H. & C. at page 83.

I am of opinion the plaintiffs are entitled to our judgment to recover the amount of the verdict on the first count.

RICHARDS, C. J., concurred, retaining the opinion expressed by him in the Court below.

WILSON, J., dissented, for the reasons given by him in the judgment appealed from.

GALT, J., and STRONG, V. C., concurred with the Chief Justice of Appeal.

Appeal allowed.

McCALLUM V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

C. S. C. ch. 66, sec 83—Injury by fire—Limitation and form of action.

The declaration alleged that defendants were possessed of a strip of land, being the bank and side of the railway separating their track from plaintiff's land: that they negligently and contrary to their duty allowed dry wood, leaves, &c., to accumulate there, on which red hot ashes, &c., fell from the engine, and there was in consequence great danger, as they knew, that the leaves, &c., would be ignited, and the fire extend to plaintiff's land, unless the leaves, &c., were removed, or care taken to prevent any fire so occasioned from extending; but that they so negligently kept such strip of land, that in consequence the leaves, &c., took fire from their engine, and thereby, and by want of due precaution by them to prevent such fire extending, the fire spread to plaintiff's land and burned his trees, &c.

Held, affirming the judgment of the Queen's Bench, 1. That the count disclosed a good cause of action.

2. That it was for an injury sustained "by reason of the railway" within Consol. Stat. C. ch. 66, sec. 83; and that the plaintiff, therefore, suing more than six months after such injury, was barred.

APPEAL from the judgment of the Court of Queen's Bench ordering a non-suit to be entered in this case, reported 30 U. C. R. 122.

The second count of the declaration, on which a verdict was found for the plaintiff, was as follows:—"And for that the defendants, at the time aforesaid, were possessed of a strip of land, being the bank and side of said railway, and which separated the track of their said railway from the lands of the plaintiff in the first count mentioned; on which strip of land grass was growing, and on which also

the defendants had carelessly, and negligently, and contrary to their duty in that behalf, allowed to accumulate large quantities of dry wood, leaves, weeds, rubbish, and decayed grasses, all of a very ignitable nature, and on which from time to time fell, as the defendants well knew, large quantities of red hot ashes and other igneous matter, which fell out of their said engine while the same was being propelled along their said track, and there was, by reason thereof, then great danger, as they well knew, that the grass, dry wood, leaves, weeds, rubbish, and other ignitable matter upon the said strip of land would be ignited, and that a fire would thereby be occasioned which would be likely to extend to the said lands of the plaintiff, and his his said trees, cordwood, and timber, unless the said grass, dry wood, weeds, rubbish, leaves, and other combustible matter were removed therefrom, or unless due and reasonable precaution was taken by the defendants to prevent any fire upon the said strip of land, occasioned by the means aforesaid, extending into the said lands of the plaintiff; but that the defendants so negligently kept the said strip of land aforesaid, and permitted the same to be in such a state that, in consequence, the grass, dry wood, weeds, rubbish, leaves, and other combustible matter thereon took fire from said red hot ashes and igneous matter from the defendants' engine; and thereby, and by reason of the defendants not having taken any due precaution to prevent the fire so occasioned from extending to the said lands of the plaintiff, and having negligently omitted so to do, the fire so occasioned did extend to the said lands of the plaintiff, and did burn large quantities of trees, cordwood, and timber of the plaintiff, then growing and being upon the said lands, and also did great injury to the said lands, whereby, and by reason of such negligence as aforesaid, the plaintiff sustained damage to the amount of \$8000.

Plea—Not guilty by Statute, Consol. Stat. U. C. ch. 66, sec. 83.

The Court below held that the cause of action set out was an injury sustained "by reason of the railway," with-

in sec. 83 of "the Railway Act," and that the plaintiff not having sued within six months was barred.

Harrison, Q. C., for the appellant, the plaintiff. (a)

C. S. Patterson, contra.

The arguments were the same as in the Court below, except that it was contended for the respondent that the Court disclosed no cause of action, for there was no such duty as it stated; that the negligence charged should have been in the use of fire, not in the care of the land: that it would not be actionable for defendants to have combustible materials on their property, though without proper precautions; and that here the liability shewn was, not for the fire taking place, but for leaving the ground in such a state that when it did take place it extended. As between adjoining proprietors it was argued that the second count would be bad. *Poulsum v. Thirst*, L. R. 2 C. P. 449, was cited in addition to the authorities in the argument below.

Harrison, Q. C., contra, contended that the count was simply such a one as would be framed in an action between adjoining proprietors, referring to *Filliter v. Phippard*, 11 Q. B. 347; *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98, 6 C. P. 14; *Viscount Canterbury v. The Attorney General*, 1 Phillips C. C. 306. As to the limitation of action he cited, in addition to the cases cited below, *Roberts v. The Great Western R. W. Co.*, 13 U. C. R. 615; *Moison v. The Great Western R. W. Co.*, 14 U. C. R. 102; *L'Esperance v. The Great Western R. W. Co.*, *Ib.* 187.

March, 18th 1871. (b)—DRAPER, C. J. OF APPEAL, [after stating the pleadings.] The plaintiff's right to recover is rested on the second count only.

(a) Argued on the 20th January, 1871, before DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J. C. P., WILSON, J., MOWAT, V. C., GALT, J., STRONG, V. C.

(b) *Present*.—DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J., C. P., WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J., STRONG, V. C.

Two questions have been discussed :

1. Whether this count discloses a cause of action.

2. If so, whether the action should not have been brought within six months next after the alleged damage accrued,

As to the first point, the case of *Smith v. The London and South Western R. W. Co.*, L. R. 6 C. P. 14, in Ex. Ch., is in the plaintiff's favour on the broad question of negligence, not advertng to the particular form of the count.

The declaration there is differently framed, and better adapted to the cause of action than in the present case. The decision was on the question whether there was sufficient evidence of negligence on the part of the defendants to entitle the plaintiff to recover. The fire had first appeared on the sides of the defendants' railway, among some hedge trimmings and cuttings of grass which had been raked together and left in small heaps within the defendants' premises, during an exceedingly dry season, and there was sufficient reason for concluding that sparks of fire from the defendants' locomotives had kindled it. The negligence charged was the leaving those dry trimmings where they took fire. In giving judgment the Lord Chief Baron said, "I think the law is, that if they were aware that these heaps were lying at the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct."

With unfeigned humility, I confess that this reasoning does not entirely remove my doubts, though it appears to be adopted by all the Judges who heard the case in the Exchequer Chamber except Blackburn, J., who, not dissenting, is not quite convinced. In the Court below, Brett, J., expressed a contrary opinion, holding that there was no evidence to go to a jury, and refers to the rule of law stated by Alderson, B. in *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 784.

As to the second point, *Prendergast v. Grand Trunk R. W. Co.*, 25 U. C. R. 193, is, I think, distinguishable on satisfactory grounds. The action was for negligently permitting a fire to remain in and upon the track of the railway, and near the close of the plaintiff, at a time when by reason of the state of the wind and weather it was improper so to do; so that through negligence and want of proper caution the fire extended out of the railway upon the plaintiff's close, and burnt fences, trees, &c. And the Court held that the injury was one at common law, by one proprietor of land against an adjoining proprietor, for negligently managing a fire supposed to be caused on the land of the latter without his neglect or default, and therefore this section of the Railway Act did not apply.

This case is not noticed in the judgment of the Court below, but *Browne v. The Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, is referred to. In that case one charge of negligence was not sounding the whistle or ringing the bell on approaching the railway crossing when the accident happened; and Sir John Robinson in giving judgment said it did not come precisely within the words of the clause, because it might be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but the whole Court agreed that "the substance and effect are the same in one case as the other."

In reference to that case it may also be observed, that the Railway Act, in regulating the use of the railway, expressly requires these signals of approach by bell and whistle, and the omission to make them was a nonfeasance arising by reason of the railway, and the collision itself arising from that omission was still more obviously the result of the same cause.

I think, therefore, this case distinguishable from that of *Prendergast v. Grand Trunk R. W. Co.* There was nothing in the cause of the fire, or in the negligence which allowed it to spread, to distinguish it from any fire which had been kindled on one man's lands and was negligently suffered by

him to extend to the premises of his neighbour. The jury acquitted the defendants of negligence, which according to the report was not even charged in the declaration, for that only alleged that the defendants wrongfully permitted a fire to remain on the track of the railway near the close of the plaintiff in a careless, negligent, and improper manner, when by reason of the state of the wind and weather it was dangerous so to do. Nothing of which the plaintiff complained and for which he got his verdict was therefore by reason of the railway, unless in the remote connection that the defendants being a railway company were possessed of the land upon which the railway was constructed. In the case now in judgment, so far as appears, the fire originated from the engine of the defendants (which the first count states) and it was in the lawful and necessary use of fire in order to carry on the ordinary business of the defendants, and *without any negligence on their part*, which fire spread and did the mischief complained of. The *causa causans* was therefore a part of the working of the railway, and the effect was "by reason of the railway;" and we are not deciding whether the defendants were guilty of negligence in letting the fire extend in manner and form as the second count charges, but whether, admitting that the second count is proved, it is a count claiming indemnity for a damage or injury by reason of the railway.

In this view the case of *Vaughan v. Menlove*, 3 Bing. N. C. 468, has no application. Tindal, C. J., states the principle of that case thus. "There is a rule of law which says you must so enjoy your own property as not to injure that of another." Parke and Vaughan, JJ., reiterate the same rule. The question was on the application of it to that case. The plaintiff had complained of the negligent management by the defendant of his own property, by which negligence the plaintiff was damaged. The Court held it was rightly left to the jury to say whether the defendant had been guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man would have observed.

There is also another matter as to the character of the fire.

I have pointed out that the second count does not charge the defendants with negligently setting fire to the dry wood, &c., on their land. The duty and the breach of it as stated rest upon a charge of a different duty. May not the fire be deemed accidental? If so, will it not come within the 86th section of the English Statute, 14 Geo. III., ch. 78, which enacts "that no action * shall be * prosecuted against any person in whose house, chamber, stable, barn, or other building, or *on whose estate* any fire shall accidentally begin." In *Richards v. Easto*, 15 M. & W., at p. 251, Parke, B., treats this section as affecting all the Queen's subjects, and in that respect public, though nearly all the rest of the Act was local. And in *Filliter v. Phippard*, 11 Q. B. 347, the same section is referred to by Lord Denman, who declares that no terms can be more comprehensive: "We cannot doubt that Baron Parke, in *Richards v. Easto*, rightly viewed it as a general law." As a general law clearly affecting property and civil rights, it must be in force here also, though it bears only upon the first point raised.

Upon the whole, I am of opinion that the judgment of the Court of Queen's Bench is right, and that this appeal should be dismissed with costs.

HAGARTY, C. J., C. P.—I am not prepared to hold that the six months' limitation does not apply to an injury like that complained of in the second count.

If the point were now raised for the first time, I should think the case came fairly within the words used, "any damage or injury sustained by reason of the railway." For all that is stated in the count the defendants were using their railway as allowed by Statute, without negligence so far as the running of the trains was concerned. It was certainly by reason of the railway the injury was caused. The negligence charged was leaving combustible matter in dry weather accumulated on the track. I think

it a most sensible provision that requires all such suits to be brought within six months.

The case may be readily distinguished from others where some direct malfeasance has caused injury, or where contracts express or implied are broken.

An English Act, 3 Wm. IV. ch. 34, had the words "any thing done or omitted to be done in pursuance of this Act, or in the execution of the powers or authorities given," &c. On this was decided *Palmer v. Grand Junction R. W. Co.*, 4 M. & W. 766, where Parke, B., discusses the law. He said the Statute would apply if the action were for the omission of some duty imposed on them by the Act, as for not duly fencing the line, &c., but not for a breach of duty as common carriers, for which they were there sued. In *Carpue v. London and Brighton R. W. Co.*, 5 Q. B. 757, Lord Denman comments on the last case, and says in the case before him the Statute did not apply; "the injury has arisen from the defendants' misconduct as carriers, and not as proprietors."

Again, in *Garton v. Great Western R. W. Co.*, in error, E. B. & E. 846, a similar question is somewhat discussed. It was sought to apply the limitation clause in the 5 & 6 Wm. IV., ch. 107, incorporating the defendants, which also requires a twenty days' notice of action, to a claim for money had and received. Bramwell, B., says, "The notice is required only in the case of some act or omission warranted, or supposed to be warranted, by the Statute. The question is always whether there was *bona fides*. The plea, to be good, must, in express terms or by implication, shew the thing done or omitted to be under the Act." Willes, J., is to the same effect. I think the words of our Act are rather more comprehensive, and that the Company may fairly claim the protection of the clause.

I have always thought that it would be found, on examination, that the Imperial Statute, 14 Geo. III. ch. 78, as to accidental fires, would extend to a case like that before us. It was not however pressed in argument. *Gaston v. Wald*, 19 U. C. R. 589, is in point. Robinson,

C. J., says: "We do not think we can give to the words used in the Statute, 'in whose house, dwelling, building, &c., any fire shall accidentally begin,' so limited an application as to refuse to call any fire accidental which arises from want of due caution, and so hold it to be out of the scope of that clause. Most accidents arise from some degree of carelessness," &c.

RICHARDS, C. J., WILSON, J., MOWAT, V. C., GALT, J., and STRONG, V. C., concurred.

Appeal dismissed.

HORSEMAN V. GRAND TRUNK RAILWAY CO. OF CANADA.

R. W. Co.—Receipt of goods—Estoppel by.

Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get it from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it that "rates and weights entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship or afterwards.

Held, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiff.

APPEAL from the judgment of the Court of Queen's Bench granting a new trial, reported in 30 U. C. R. 130, where the pleadings and facts of the case are fully stated.

The respondents had given a receipt for certain iron delivered to them at Montreal for the plaintiff, to be carried to Guelph, and had specified in the receipt the number of bars and bundles and the gross weight. On arriving at Guelph, the weight fell short by about 2,400 lbs; and the question in this action was whether, under the facts proved, the defendants were estopped by their receipt and liable for the deficiency, it being admitted that they had in fact delivered all that they received. The Court held that defendants were not responsible, RICHARDS, C. J., doubting.

Anderson, for the appellants.

M. C. Cameron, Q. C., contra.

The arguments and authorities cited were the same as in the Court below. (*a*)

[March 18th, 1871 (*b*)]—*DRAPER*, C. J., OF APPEAL delivered the judgment of the Court.

As I understand the case, the plaintiff's agent (*Davis*) gave the defendants' agent (*Shedden*) an order to obtain from on board the ship "*Ruby*" a certain number of bars and bundles of iron marked in a certain manner. The defendants' agent received the specified number of bars and bundles (less 34 bars, for which the plaintiff got compensation) marked as mentioned in the order. The plaintiff's agent gave what is called a shipping note to defendants for the conveyance of the 2330 bars and 20 bundles to the plaintiff at *Guelph*, adding in a separate column the weight; and there was written at the foot "34 bars short," as if the deficiency had only been discovered after the shipping note was drawn up. It does not appear that any thing was done to ascertain the weight, either as the iron was being taken out of the ship or after it was landed. *Shedden*, on behalf of the defendants, signed a receipt acknowledging that the defendants had accepted the iron, describing it in precise accordance with the shipping note, stating the same weight; but on the top of this receipt was printed as a special notice, that "rates and weights entered on receipts or shipping bills will not be acknowledged." "34 bars short" was also written at the foot of this receipt as on the shipping note.

All the bars and bundles delivered to *Shedden* out of the ship as the plaintiff's property, were carried by the defendants' railway and delivered to the plaintiff. If they had

(*a*) Argued on the 23rd January, 1871, before *DRAPER*, C. J. of Appeal, *RICHARDS*, C. J., *HAGARTY*, C. J. C. P., *WILSON*, J., *MOWAT*, V. C., *GALT*, J., and *STRONG*, V. C.

(*b*) *Present*.—*DRAPER*, C. J. of Appeal, *RICHARDS*, C. J., *HAGARTY*, C. J. C. P., *WILSON*, J., *MOWAT*, V. C., *GWYNNE*, J., *GALT*, J.

all been his iron the defendants would have fulfilled their contract, and they contend they have done so by the delivery of all they received, whether in fact his or no. But a very large discrepancy between the weight mentioned in their receipt and the weight of the bars and bundles delivered was discovered.

It turned out that other parties (resident at Chatham) had iron on board the "Ruby." The agent of these parties received on their account, direct into a vessel, a number of bars of iron which were delivered from the "Ruby," to be conveyed to Chatham, the marks on a part thereof being the same as those on the plaintiff's iron. On the arrival at Chatham it was discovered that there was a great *excess* of weight, though, as with respect to the plaintiff's iron, there was a small deficiency in the number of bars, and this led to enquiries, which resulted in the plaintiff getting from Chatham a part of what he expected to have received from Montreal, and thus making up a part of the deficient weight; and he sent to Chatham in exchange a part of the iron which the defendants had delivered to him.

The evidence thus makes it tolerably clear that, whether from similarity of marks or from the iron belonging to the different parties not having been sufficiently kept separate in loading or unloading the "Ruby," the error must have accompanied the delivery of the iron over the "Ruby's" side, and therefore preceded the delivery to and the receipt by Shedden under the authority of the delivery order handed to him by Davis, the plaintiff's agent. It was not weighed as delivered from the ship, nor was it weighed at the railway station in Montreal. It is left to conjecture how the weight was arrived at which was inserted in the shipping note and the defendants' receipt; but there is little danger of error in assuming that it was from the bill of lading, for the weight was no doubt ascertained at the time of shipment in order to ascertain the amount chargeable for freight. In what may be called the natural order of the transaction the shipping note would precede the

receipt by the defendants, and if so, the representation of weight was merely the adoption by the defendants of the quantity stated in the plaintiff's shipping order, both parties knowing that the iron would be weighed in Guelph, the defendants' receipt giving special notice that they were not bound by the weight entered in the receipt or in the shipping bill.

Then it is proved that the identical bars and bundles of iron which were received from the "Ruby" on the plaintiff's account, were delivered by the defendants to the plaintiff at Guelph. Against this is urged that the defendants having in their receipt and contract to carry acknowledged that the bars and bundles mentioned therein weighed 39 tons, &c., are estopped from denying that they received that weight of iron to carry, and that they delivered some twenty-four thousand pounds less. This contention is, as I understand, founded on the principle, that if any one by his acts or conduct represents to another as a fact that which is not a fact, meaning that his representation should be acted upon, and it is acted upon, as true, so that that other alters his own position prejudicially, the former cannot assert as against the latter that his representation was not true; he is bound by it, and is liable to make to the latter compensation for any loss sustained by acting upon the representation. Or, to state the proposition as applying to the facts of this case, if the defendants untruly represented to the plaintiff the weight of the iron, intending that the plaintiff should believe that statement and act upon it, and he did so, and thereby changed his previous position, they cannot against him shew that they actually delivered all the iron they received, because what they delivered fell far short of the weight which they represented they had got.

No doubt there has been a mistake or negligence from which the plaintiff has suffered. But it could not be deemed defendants' fault that a part, apparently a considerable part, of the plaintiff's iron was delivered to other parties out of the ship, and that iron so marked, or the

marks so defaced as to mislead, was delivered on his account out of the ship when it was not his property. I cannot find evidence in this case to justify me in holding that in stating the weight in their receipt they knew it was untrue, still less that they made it as a representation which they meant him to act upon, when they told him specially that they did not acknowledge weight entered in receipts or shipping bills. It is not pretended that they knew of the deficiency, nor shewn that they neglected any duty in not ascertaining it; nor can it be pretended that the representation was intended to bring about loss to the plaintiff, or to induce him to alter his position. Nor do I think that it can be reasonably held that their representation did occasion him to alter his position to his prejudice—that anything the plaintiff did, or abstained from, or lost the proper opportunity of doing, was the reasonable or probable effect of defendants' receipt.

I think the appeal should be dismissed with costs.

HAGARTY, C. J. C. P., WILSON, J., GALT, J., MOWAT, V. C., and STRONG, V. C., concurred.

RICHARDS, C. J., retained the opinion expressed by him in the Court below.

Appeal dismissed.

THE CORPORATION OF THE COUNTY OF WELLAND V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

The judgment of the Q. B. reported in 30 U. C. R. 147 affirmed; *Holding*, that the plaintiff could not, under the facts proved, maintain ejectment against the defendants for land occupied by them for their railway.

APPEAL from the judgment in this case, reported in 30 U. C. R. 147, deciding that the plaintiffs could not, under the facts stated there, maintain ejectment against the defendants for land used and occupied by them for the purposes of their railway, and upon which their track and station was.

HARRISON, Q.C., for the appellants, the plaintiffs in the Court below (a). The defendants do not claim or set up any authority under the Crown. The plaintiffs claim under a deed from the Commissioners of Public Works. The only question to be tried here, the action being ejectment, is whether the plaintiffs are entitled to possession, and whether the statement of their title is true or false: *Robinson v. Smith*, 17 U. C. R. 218; Consol. Stat. U. C., ch. 27, sec. 21. Secs. 2, 5, 18, and 26 of the same Act, all shew that all depends upon the statement of title being proved. Here it was proved to be true beyond doubt. Defendants rely, and the judgment below proceeds, upon the assumption that the public interest and the hardship of the case can form a defence in ejectment. But this is not the law. In *Doe Hutchinson v. Manchester R. W. Co.*, 14 M. & W. 687, a similar action, Pollock, C. B., says, "It is said that the Company are placed in a difficulty in consequence of their having begun to construct their works upon this land; but they need never have placed themselves in that position." The cases in equity are to the same effect. *Walker v. Ware, Hadham, and Buntingford R. Co.*, L. R. 1 Eq. 195, shews that the owner of land taken for a railway has a lien upon it for the purchase money, which will be enforced by sale, though the railway is in public use upon the land. [STRONG, V. C.—There the Company were in default under a contract. Here the case is that the owner stood by and saw them taking the land.] Sir John Romilly says in that case: "It is said that the enforcement of the title would interfere with the rights of the public. Now, I admit that the rights of the public are to be considered; but can it be said that a railway company may take a man's land without paying for it, and when he seeks to enforce payment of the purchase money, may set up as a defence the rights of the public? I know of no authority for such a contention,

(a) Argued on the 20th January, 1871, before DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J. C. P., WILSON, J., MOWAT, V. C., GALT, J., STRONG, V. C.

and I certainly will not be the first to sanction it. The public, in my opinion, cannot be interested in having a man deprived of his property." *Wing v. Tottenham and Hampstead R. W. Co.*, L. R. 3 Ch. App. 744, per Selwyn, L. J.; *Raphael v. Thames Valley R. W. Co.*, L. R. 2 Ch. App. 147, are to the same effect. In *Galt v. Erie and Niagara R. W. Co. et al.*, 19 C. P. 357, some of these cases are referred to. They all shew that the right of property is paramount to any public interest. The cases which will be relied on for the defendants are *Doe Armistead v. North Staffordshire R. W. Co.*, 16 Q. B. 526, and *Doe Hudson v. Leeds and Bradford R. W. Co.*, *Ib.* 796, but in the one case the purchase money was deposited and the requisite bond given under the Act, and in the other possession was taken under an agreement with the plaintiff. *Rankin v. Great Western R. W. Co.*, 4 C. P. 463; *Cotton v. Hamilton and Toronto R. W. Co.*, 14 U. C. R. 87; *Grimshawe v. Grand Trunk R. W. Co.*, 19 U. C. R. 493, all go to shew that but for some such facts the plaintiff could have recovered. [STRONG, V. C.—It seems to me that the way to look at the case is this: Was the original entry good as against the Crown? Could they have filed an information for intrusion? I suppose there is no doubt that they could. Then if so, when did the possession ripen into a right as against the Crown?] It certainly has not done so here. They have not followed the provisions of "The Railway Act," Con. Stat. C. ch. 66, and without that they could acquire no title. Sec. 9 sub-secs. 2, 3, sec. 10, sec. 11 sub-sec. 20, shew that until award made and compensation paid there is no right of possession as to private lands; and that as regards Crown lands, there must be the consent of the Governor in Council. Sec. 11 sub-sec. 31 relates to land reserved for naval or military purposes. Suppose the Crown were claiming here under an information for intrusion, what defence could there be? [WILSON, J.—We cannot suppose the Crown doing injustice.] There is no injustice here in the plaintiff's claim. The hardship is the other way. We

cannot make them arbitrate, for the six months have elapsed and they set us at defiance: Consol. Stat. C., ch. 66, sec. 83; arbitrations are within this clause. The fair argument from the deed here is that, when it was executed, the Crown knew nothing of the existence of the railway, for it is called a *proposed* railway. The plaintiffs' title has been proved. The defendants do not shew any license, or easement, or title of any kind, nor could they be allowed to do so, for they have set up none in their notice: *Pettigrew v. Doyle*, 17 C. P. 459; *Canada Co. v. Weir*, 7 C. P. 341; *Prince v. Moore*, 14 C. P. 349; *Chadsey v. Ransom*, 17 C. P. 629; *Burke v. Battle*, 17 C. P. 478; *Hartshorn v. Earley*, 19 C. P. 139. [DRAPER, C. J. of Appeal.—But they may rely on the statutes and other facts as shewing that the Crown never could have given you the title they have set up.]

E. B. Wood, contra.—It is a reasonable inference from all the facts that the Crown knew the road was laid out. It crosses the canal, a public work, close to this land, which it could not have done except by arrangement with the Crown: Consol. Stat. C: ch. 66 secs. 136, 137, 138, 140. Moreover, the road as existing has been recognized by statute. 16 Vic. ch. 45 mentions in its recital an Act which refers to it, and in repealing the 13 & 14 Vic. ch. 72 by 14 & 15 Vic. ch. 121, it is recognized as having acquired rights. The fair conclusion is, that the Crown was a consenting party to the occupation of the land by the railway and defendants cannot now be treated as trespassers.

March 18th, 1871, the following judgments were delivered (a).

DRAPER, C. J., of APPEAL.—This is an ejectment brought to recover possession of about an acre and a half of land, part of lot number 27 in the first concession of the township of Humberstone, being a strip of land distant two chains from the east line of the guard lock of the Welland canal, one chain in width by seventeen chains nine links in length. Upon it is the track of the Buffalo and Lake Huron Rail-

¹) *Present*.—DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J., WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J.

way, and the station house and other buildings connected therewith.

The plaintiffs shewed a clear title to the land in question under a deed dated in February, 1854, and made under the authority of the Statutes of Canada 13 & 14 Vic., ch. 13, which enabled the Commissioner of Public Works to sell, and 14 & 15 Vic., ch. 139, and 16 Vic. ch. 221, which enabled the Corporation of the County of Welland to buy, the tract of land lying principally within the townships of Wainfleet and Humberstone, and "known as the Great Cranberry Marsh." The Act of the 14 & 15 Vic. required the purchase to be completed before the end of the next session of Parliament; the Act of 16 Vic. recited an agreement entered into and a first instalment of the price paid, and extended the time for completing the purchase; it also authorized a mortgage to be given for the balance of the purchase money. It does not appear whether such mortgage was ever given, or if given whether it has been discharged. These lands had been vested in the Crown, having been originally granted by the Crown to the Welland Canal Company.

The Buffalo and Lake Huron Railway Company, in the first instance, became a corporation under the Statutes authorizing the formation of Joint Stock Companies, and the Act 16 Vic. ch. 45, recited that they had expended large sums on their railway between Fort Erie and Brantford, and gave them authority to construct a railway from the Niagara River at or near Fort Erie to Brantford, and thence through Paris and Stratford to Lake Huron, at the town of Goderich. This Act also incorporated the several clauses of the Railway Clauses Consolidation Act, and especially those with respect to powers, plans and surveys, lands and their valuation, and several others, into that Act. The 12 Vic. ch. 84, had given them as a joint stock company powers to enter into lands required by them, and to acquire the same, making compensation. The case of lands set apart for the Indians was specially provided for.

The Statute 19 Vic. ch. 21, incorporated the defendants the Buffalo and Lake Huron Railway Company, and after

recitals of an agreement and other matters, on an event which has happened, transferred to and vested in this new corporation all the property real or personal of the former corporation, giving power to enforce any contracts made with the former corporation respecting lands required for the purposes of the railway, subject as to any contracts they may enforce, to the liabilities which would have attached on the former corporation were they enforcing the same. This statutory transfer included "all the line of railway and works either wholly or partly constructed and in course of construction from Fort Erie to Goderich;" also "all the right of way from Fort Erie to Goderich, and all the lands that have been purchased or taken possession of by" the Buffalo and Brantford Railway Company, "whether yet paid for or not, and whether the price thereof may have been yet agreed to or not, including all lands bought or taken possession of either for the present purposes of the line, stations, gravel pits or other conveniences, or with a view to further requirements." This is the language of one of the schedules to the agreement, which the 18th section of this statute legalizes and confirms, including expressly the purchase of the railway, all property and privileges mentioned or intended to be included in the agreement, and in the schedules thereto.

At the trial it was proved that the railway was laid out about 1851; the company then were procuring the right of way, and in November, 1851, the contractors commenced to work. Stakes were planted every 100 yards, and in December, 1852, or January, 1853, grading was commenced immediately to the east of the premises sought to be recovered in this action. The road was opened for traffic as far from Fort Erie as Caledonia, far beyond these premises, in the fall of 1853.

At the time when, on behalf of the plaintiffs, the contract to purchase the great Cranberry Marsh was made, the railway people had taken possession of the premises, and when they got their deed the railway was in operation. But long before then the Welland Canal was a public work, and at this particular spot the railway was constructed at

right angles or nearly so to the canal, which it crosses by a bridge. It is quite certain that if objection had been made on behalf of the Crown, to whom the premises in question as well as a very large quantity of the surrounding land belonged, it would have been known, but so far as acquiescence is proof of assent it unmistakably existed here.

Nor can the defendants, though a corporation, pretend any ignorance of the existence of the railroad, for in the conveyance to them one of the points to be reached in the description is, "to the south boundary of the proposed Buffalo and Brantford Railroad; thence north $88\frac{3}{4}^{\circ}$ west, 10 chains and 60 links, more or less, along the southern boundary of said railroad." The word "proposed" was remarked upon. Unless introduced ignorantly, it only shews me that the description of the land in that neighbourhood which was not required for the use of any of the public works of the Province had been prepared a long time before it was used, as the facts proved in reference to the commencement and progress of the construction of the railway abundantly shew. Then ever since they obtained their title they have, apparently [without remonstrance or objection, acquiesced in the continuance of that user, which commenced while the lands were public property. Connecting this with the powers conferred by the Legislature, it appears to me that, though the Buffalo Brantford and Goderich Railway Company entered irregularly, not having fulfilled the preliminary conditions, they entered *bonâ fide* to construct a railway, which the Legislature authorized them to construct. Under all the circumstances, I agree in the opinion given in the Court of Queen's Bench, that they are not to be treated as trespassers. In *Rankin v. The Great Western R. W. Co.*, 4 C. P. 463, Sir James Macaulay, C. J., collects and comments on the leading authorities up to that date. I will only refer to the additional case of *Marquis of Salisbury v. The Great Northern R. W. Co.*, 17 Q. B. 840. It confirms *Doe Armitstead v. North Staffordshire R. W. Co.*, 16 Q. B. 526, which among others is commented on by Sir J. Macaulay.

I have no doubt that the plaintiffs may by proper proceedings obtain compensation for any damage they have actually sustained, but I cannot help viewing this as a very ill-advised proceeding, looking like an attempt to gain the opportunity of enforcing an unreasonable demand, and of extorting from the defendants a sum which in a merely reasonable spirit they would not demand.

I am of opinion the appeal should be dismissed with costs.

HAGARTY, C. J., C. P.—Sec. 113 of the Railway Clauses Consolidation Act requires the filing with the Commissioners of Public Works of a map or profile of the railway, and of the land taken, within a reasonable time after completion.

Sec. 133 forbids a Railway Company taking possession of any Crown land without the consent of the Governor in Council.

By sec. 137, if the railway be carried across any canal, &c., the company shall have openings between the piers of their bridge, and be subject to regulations prescribed by the Governor in Council.

Sec. 138 forbids the construction of any bridge, pier, or work, upon or over any canal, &c., until they have first submitted the plan of such work to the Governor in Council, and it has been approved by him.

By sec. 146, the Governor in Council may authorize the company to construct fixed instead of swing bridges.

This was the law while the Crown held this land, and when the railway was carried over the Welland Canal and through this land; and the line was in operation in the year preceding the grant to the plaintiffs, in 1854. From that time to the bringing of this action in 1867, the defendants have had the undisturbed user of the land for their track, and of their passage over the Canal. I think, at this distance of time, with the stringent clauses of the Act just cited, we may properly assume that the defendants took this piece of Crown land and crossed the Canal with the assent of the Governor in Council.

We also find that the Legislature passed Statutes respecting this line of Railway from Fort Erie to Brantford, legalizing its transfer and recognizing it as an existing working line, necessarily crossing the Welland Canal and this piece of land.

It is sufficient, I think, to defeat this most extraordinary claim, to say that on the evidence before us we cannot hold the defendants trespassers. The law is very fully discussed in *Rankin v. Great Western R. W. Co.*, 4 C. P. 463.

RICHARDS, C. J., WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J., and STRONG, V. C., concurred.

Appeal dismissed.

HENDRICKSON V. THE QUEEN INSURANCE COMPANY.

Policy—Condition—Notice of other insurance.

One of the conditions of an insurance policy was: "Persons who have insured property with this company shall give notice of any other insurance already made or which shall afterwards be made elsewhere on the same property, so that a memorandum of such other insurance may be indorsed on the policy or policies effected with this company," &c.

After the policy had been assigned, the assignees effected another insurance, of which the only notice given, if any, was a verbal one to P., the agent of the company at Sarnia, their head office being in Montreal, and not endorsed on the policy, which was not produced at the time.

Held, affirming the judgment of the Queen's Bench, that such notice was insufficient, RICHARDS, C. J., MOWAT, V. C., and STRONG, V. C., dissenting.

APPEAL from the judgment in this case ordering a nonsuit to be entered. The pleadings and facts are fully stated in the report below, 30 U. C. R. 108, and in the judgment of the learned Chief Justice of this Court.

Becher, Q. C., and *S. Richards*, Q. C., for the appellant (*a.*)
M. C. Cameron, Q. C., and *Anderson*, contra.

The arguments were the same as the Court below.

(*a*) Argued on the 22d January, 1871, before DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J. C. P., WILSON, J., MOWAT, V. C., GWYNNE, J., STRONG, V. C.

In addition to the cases there cited, *Linford v. Provincial Horse and Cattle Ins. Co.*, 34 Beav. 291; *Thorn v. Commissioners of Public Works*, 32 Beav. 490; *North British Ins. Co. v. Hallett*, 7 Jur. N. S. 1263; *Story on Agency*, sec. 140 (a); *Fowler v. Scottish Equitable Life Assurance Society*, 32 L. T. 120; *Park v. The Phoenix Ins. Co.*, 19 U. C. R. 115; *Noad v. Provincial Ins. Co.*, 18 U. C. R. 585; *Hatton v. Beacon Ins. Co.*, 16 U. C. R. 317; *Jacobs v. The Equitable Ins. Co.*, 17 U. C. R. 35, 19 U. C. R. 250, 257; *Richards v. Liverpool and London Ins. Co.*, 25 U. C. R. 400; *Ellis on Ins.*, 142, 152, were cited for the appellant; and *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Wright v. Skinner*, 17 C. P. 317; *Avery v. Bowden*, 6 E. & B. 953, 6 H. L. Cas. 995, for the respondents.

DRAPER, C. J., OF APPEAL, [March 18th, 1871]. (a)—The declaration is on a policy of insurance, dated 9th November, 1865, made by defendants, on a two-story house, \$3,500; furniture, &c., \$1,300, and on a stable, \$200, from the 11th October, 1865, to 11th October, 1866, in favor of the plaintiff, stating that before the 11th October, 1866, the plaintiff assigned the property and premises to one Morris, and, with defendants' consent, the policy; and that Morris, before the said 11th October, assigned the same property and premises to Batchelder and Pettingell, and, with the consent of the defendants, the policy: that after these assignments, and before the said 11th October, the said house and furniture, &c., were destroyed by fire, and thereby Batchelder and Pettingell suffered loss on the house \$3,500, and on the furniture, &c., to \$1,300; and that this action is brought by the plaintiff as trustee for Batchelder and Pettingell.

The pleas: 1, denied making the policy; 2, denied the assignment of the policy by Morris to Batchelder and Pettingell, and defendants' consent to that assignment; 3,

(a) *Present*.—DRAPER, C. J. of Appeal, RICHARDS, C. J., HAGARTY, C. J. C. P.; WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J., STRONG, V. C.

set up that the policy was subject to a condition that insurers should give notice of any other insurance already made, or which should thereafter be made elsewhere on the same property, so that a memorandum of such other insurance might be indorsed on the policy effected with defendants, otherwise such policy would be void: that Batchelder and Pettingell, after the assignment to them, effected another insurance with the British America Insurance Company, on the same property mentioned in the declaration, for the sum of \$2,500: and that neither Batchelder nor Pettingell nor the plaintiff gave notice thereof to defendants, nor was the same indorsed on the policy.

Issues on all the pleas, and a second replication to the third plea, traversing the denial of notice of the other insurance. Issue thereon.

Two questions are thus raised: 1. Did Morris duly assign the policy to Batchelder and Pettingell, and defendants agree thereto. 2. Did Batchelder and Pettingell omit to give notice to defendants of the second insurance.

It was proved that one Poussett was agent for defendants at Sarnia, and that he appointed one Adamson as his sub-agent at Oil Springs. Adamson signed a consent, indorsed on the policy, dated 27th November, 1865, to an assignment to be made by the plaintiff to Morris; and Poussett signed a memorandum of the same date attached to the policy, that in case of loss by fire the amount, if any, should be payable only to Morris; and the plaintiff by an indorsement on the policy, dated 21st December, 1865, assigned it to Morris. At the trial these several things were admitted. The pleas did not deny the assignment to Morris; nor did the replication to the third plea deny the insurance with the British America Insurance Company. By deed, dated 21st December, 1865, Morris conveyed the insured property to Batchelder and Pettingell. Adamson was consulted about this transfer, and he spoke to one Campbell, who was proved to be defendants' inspector, and whose duties were thus described by Mr. Forbes, who said he was the secretary and general agent and "principal

man" for defendants in this country; "His (Campbell's) duty is to view the properties insured and report to me." Adamson swore he spoke to Campbell, who told him to take the same form as indorsed on the policy, as used on the former assignment, and Adamson drew it up. The plaintiff had kept a temperance house, but Batchelder and Pettingell commenced keeping a bar. Campbell told Adamson the premium must be and it was increased. Poussett indorsed a receipt for it on the policy, and gave a separate receipt to Batchelder and Pettingell for extra premium "in consequence of spirituous liquors being sold. This sum is to pay for the balance of the term of the policy, which expires 17th October, 1866. No. 95,511, insured by one Jacob Hendrickson." Poussett also accounted for the extra premium in his account rendered to Mr. Forbes; and in a letter addressed to Forbes, dated 2d May, 1866, Poussett, in a postscript, wrote: "The parties owning the Oil Springs Exchange" (the house insured) "have deposited \$20 with me to be indorsed as the extra rate on the policy." The defendants' accountant at Montreal, where the principal office was, acknowledged the receipt of this letter, and on the 9th May, 1866, wrote thus to Poussett: "About the middle of January last our inspector (Mr. Campbell) arranged that on account of the increased risk under policy No. 95,511, Oil Springs Exchange, the rates should be advanced to 50s. The extra premium to be paid should therefore be \$37.50 or three-quarters of \$50."

As to notice to defendants of the insurance with the British America Insurance Company, the plaintiff's counsel called Eugene Pettingell, a son of one of the beneficial plaintiffs, and who lived at the Oil Springs Exchange in 1866. About the 10th of July he said he came to Sarnia and saw Poussett; Batchelder was with him. Batchelder told him he had insured in the British America Company on these premises for \$2,500; he made some reply, which the witness did not recollect. Batchelder came expressly for the purpose, and witness "just came with him;" he did not see the policy, and nothing was said by either of them as to

having it indorsed on the policy. On the other hand. Poussett swore he had no recollection of any notice being given to him of this second insurance ; that at the time of the fire he was not aware of it. He said he received the additional premium from Batchelder in July ; he was then alone : that before this Campbell had called his attention to the fact that enough was insured on this building, and that if he had heard there was a further insurance of \$2,500, it would have attracted his attention.

On this evidence, it was objected for the defendants, that the plaintiff could not sue for Batchelder and Pettingell, for though there might be privity between him and Morris, there was none between him and Batchelder and Pettingell : that by the contract between him and Morris the loss was payable to Morris alone, so that he could not assign it : that the defendants were not shewn to have assented to the transfer from Morris to Batchelder and Pettingell ; and that the plaintiff had no interest in the property when Morris assigned to Batchelder and Pettingell ; and the notice of the second insurance was insufficiently proved—that it should have been given by the plaintiff or by Morris, and the policy should have been produced that it might be indorsed with a memorandum respecting the second insurance. Leave was reserved to move, and the jury found for the plaintiffs.

A rule *nisi* for a nonsuit was granted. The Judges differed ; the Chief Justice and Wilson, J., thinking that there was evidence to go to the jury on the second issue in support of the plaintiff's case, Morrison, J., dissenting. Morrison and Wilson, J. J., thought the plaintiff failed on the third issue ; the Chief Justice dissenting. And the rule for a nonsuit was made absolute.

I entirely agree with the opinion of my brothers Wilson and Morrison as to the third issue, and I agree with the former in his doubt as to whether so much as a verbal notice or remark in conversation was ever given or made by Batchelder to the plaintiff's agent Poussett. I tried this case in May, 1867, and the evidence given in support

of the plaintiff's contention at the last trial has not changed the impression made on my mind by the evidence given before me. The words and expressed object of the condition confirm me in my present conclusion.

"Persons who have insured property with this company shall give notice of any other insurance already made, or which shall afterwards be made elsewhere on the same property, *so that* a memorandum of such other insurance may be indorsed on the policy or policies effected with this company," &c.

There is probably no condition more important than this for the prevention of a fraud; and there is no fraud more likely to be attempted by a fraudulent and dishonest insurer than that of procuring an over-insurance of his property, thus diminishing any inducement to take every reasonable precaution against accidental fire, if not operating as an incentive to something worse. I am almost surprised that the condition does not insist on *this* notice being in writing, especially as circumstances may impede the production of the policy at the time the notice is given. As it is, the words of the condition go farther than requiring *a* notice; it must be a notice *so that* a memorandum of such other insurance may be indorsed on the policy; and though its terms do not require the immediate production of the policy for indorsement, they go far enough to require a notice such as may at some time be indorsed when the policy is produced. This might not happen until after the destruction of the insured property by fire, and it would be inconvenient, if not dangerous, to trust to the memories of the insurer or of an agent of something alleged to have been said some days, weeks, or months before. It was fortunate, so far, that Batchelder was accompanied by a youth, a son of his partner, who "just came along with him," and whose memory of what passed was so much better than Mr. Poussett's, who did not remember it, and who swore that at the time of the fire he was not aware of the second insurance. Independently, however, of all this, I fully adopt the reasons upon

which my brother Wilson founded his conclusion in the Court below.

I should perhaps advert to the point raised by one of the plaintiffs' counsel, that this condition only applied to the original insurer, and not to an assignee of the property insured. It rests upon a rigidly literal construction of the condition. The learned counsel candidly admitted that the objection had only occurred to him on the day preceding his taking it. I have arrived at the conclusion that it is untenable.

I think the appeal should be dismissed with costs.

HAGARTY, C. J. C. P.—I am of opinion the appeal should be dismissed.

My judgment proceeds wholly on the objection as to notice.

The only construction I can put upon the clause is, that the whole burden of getting the consent of the company to the new insurance evidenced by memorandum endorsed, is cast upon the assured, and that the mere giving of a notice is insufficient. It is quite true that it is provided that they may cancel the policy on receiving notice; that is one alternative result of the new insurance; the other is their endorsed consent. When the new insurance is made, the company may do one of two things: first, testify their assent by indorsement; second, exercise their right to cancel.

I am told that we should construe these conditions strictly against, not in favor of, the underwriters. This may be so; but I think, at the same time, we must give some rational and intelligible construction to a contract like this. The plaintiff contends that it is sufficient for him to tell the company or their local agent of the fact of his having effected the new insurance; every thing else must be done by them. I think the clause required something more. Notice was to be given, so that a memorandum might be indorsed of such other insurance on the policy, otherwise it was to be void. Who was to do this? The plaintiff had the policy of insurance, or must be

supposed to have it. Can it be possible that he fulfils his part of the bargain by sending a verbal message to an agent of the company, or calling out to him, if he meet him in the street, that he has effected another insurance? Is that giving notice, so that "a memorandum of such other insurance" may be indorsed on a policy that he may have in his pocket or may be fifty miles away? I cannot accede to any such construction.

If such a notice be sufficient, is it then to become a question whether reasonable time had or had not elapsed for the company to signify their intention of cancelling, before a loss by fire, or is a duty thrown on the company to require the production of the policy, in order that they may endorse a memorandum on it of the fresh insurance? It seems to me contrary to the principles of construction so to interpret this clause.

If this notice be held sufficient, then we must equally hold the clause complied with, by telling the company's agent, wherever he may be met, in a railroad carriage or steamboat, or an hotel, or by calling it out to him across a street, if a jury thought proper to find that the agent either heard it or ought to have heard it.

I think the law casts on the plaintiff, who holds the contract, the duty of producing it for the required indorsement.

WILSON, J., and GWYNNE, J., concurred.

RICHARDS, C. J., thought the appeal should be allowed, retaining the opinion expressed by him in the Court below.

MOWAT, V. C.—If this case had come before me in Chancery on the same evidence, I would have held that the proof of notice to Mr. Poussett of the second insurance was insufficient; but I understand that all the members of the Court are agreed that the verdict of the jury is now conclusive as to the fact of notice having been given in the way stated by the plaintiff's witness. The case is not free from suspicion otherwise, but there may be no real founda-

tion for any suspicion; and the case is now before us in such a way that all which we have to consider is whether, assuming the plaintiff's claim to be honest in all respects, it is sustainable in point of law; and the question of law on which there is a difference of opinion amongst us is, whether, if the notice to Mr. Poussett was given as stated, such a notice is a sufficient compliance with the fourth condition of the policy.

A corporation acts wholly by agents; and in the present case it is conceded that notice to the head office or principal manager of the company was not necessary, the head office being in England. The notice, therefore, had to be given to the company through some agent in the Dominion. The principal office in the Dominion was out of this province, viz., in Montreal; and the contention on the part of the company is, that the notice should have been given by the plaintiff to that office directly, and that notice to the local agent was insufficient. There is no evidence that the officers of the company in Montreal had authority to receive such a notice, or to cancel the policy; and no evidence that the local agent had not such authority; in fact, there is no evidence what authority the company had given to any of its agents on this subject. The company itself, by the policy or otherwise, made no announcement and gave no information on the subject. Can it be said, under these circumstances, that notice to the local agent was insufficient? It was through him (or rather his sub-agent) that the insurance had been effected; it was to him that the premiums were from time to time paid; he was the person to whom, on behalf of the company, the twelfth condition directed that the assured should give notice of loss or damage should any occur (*a*); to him the account of it was to be delivered; and he might be, and I presume usually is, the agent through whom the company acts in the various matters with which the other conditions

(*a*) The twelfth condition required that persons sustaining loss by fire should forthwith give notice thereof "to the Company, or to the agent through whom the insurance is effected," &c.

of the policy contemplated that an agent for the company might have to do.

The fourth condition, which relates to further assurances, required persons who had insured property with this company, "to give notice of any other insurance *already* made, or which shall afterwards be made elsewhere, on the same property." Now it was by the local agent, undoubtedly, that the notice of antecedent insurances was meant to be received, for it cannot be supposed that the application for the insurance in this company was to be made to him, and that a direct communication to the Montreal office was to be given as to any antecedent insurance; but the reference to further insurances is part, not only of the same condition, but of the very same sentence; and there is not a word to indicate to the insured that the company meant that the same person to whom notice of antecedent insurances had to be given was not to receive notice of subsequent insurances also.

In view of this single consideration, it seems to me to be out of the question for the company to be permitted to say for the first time when sued, that, though one of the notices required by the condition was to be given to the local agent, yet the other was to be given to some other agent, in regard to whom the policy said nothing.

Even without this conclusive circumstance, the Courts in the United States hold that notice to the local agent is notice to the company of any subsequent insurance. Thus, in *Wilson v. Genesee Mutual Insurance Co.*, 16 Barb. 511, the Supreme Court of the State of New York so held, and the reasoning of the Court seems most just: "Every agent is presumed by law, and may also be presumed by all persons innocently dealing with him, to possess every power necessary, or naturally incident, to his agency. In the case, then, of an insurance company, systematically transacting, and even soliciting business at points remote from its primary location, what powers might reasonably be assumed to have been conferred by it upon a person permanently established, and publicly held out to the world,

as the agent of the Genesee Mutual Insurance Company? Or rather, for that is the only point necessary to be considered, was the power of receiving notices of other insurances on the same property and indorsing them on the policy, among the reasonably to be presumed powers?

* * * The policy provides that notice shall be given to the 'company,' but specifies no particular agent through whom it is to be given. It also provides that the insured 'shall have the same indorsed' on the instrument, but it does not say by whom the indorsement shall be made. In the absence, then, of all express indication on the part of the company, what more natural on the part of the dealer (the assured) than to look to the 'agent in his vicinity,' the person held out and publicly advertised as such by the company itself?" This appears to have been the law in the United States for twenty years, and I see no reason whatever why we should adopt a different construction in this country. I refer also to *Schenck v. Mercer County Mutual Ins. Co.*, 4 Zab. N. J. 447; and to *Phillips on Ins.* 5th ed., sec. 881, p. 414.

The reason suggested on the part of the respondents for holding notice to the local agent insufficient is, that the notice must be to an agent or officer who had power to cancel the policy in pursuance of the option for which the condition provided. The American Court thought, in the case cited, that the local agent should, under such a condition, be presumed to have the power of indorsing on the policy the memorandum required of the further assurance—that such a power might fairly be presumed to be incident to his agency. Such power, however, of indorsing the notice, does not necessarily involve the power of cancelling, nor would the indorsing of the memorandum of the notice having been given prevent a cancellation of the policy.

The second condition of the policy provided that, if by reason of any alteration in the premises, or of any addition to them, "or from any other cause whatever, the company or its agent shall desire to terminate the insurance effected

by this policy, it shall be lawful for the company or its agent so to do, by notice to the insured or his representative;" and I apprehend that, under this condition, if the local agent saw at any time cause for terminating an insurance promptly, and without awaiting communication with the head office, it was within the intention of the company that he should have the power of doing so. Cases may arise in which the just interests of the company would require that course to be taken by the local agent.

But if he had not the power of cancelling the policy in pursuance of the option for which the fourth condition provides, why may he not have been intended to be the medium through which the notice was to be communicated to the Company? What reason could the insured have for supposing that on this subject he was to communicate directly to the office at Montréal, and what reason have we for holding, after a fire has taken place, that that course was incumbent on the plaintiff? The original application for insurance was to the local agent, yet its acceptance depended, I presume, on the manager or board at the head office. Nobody supposes that the notice to the Company of any addition or alteration, according to the second condition, had to be, or was intended to be, to any other than the local agent, though he might have to communicate on the subject with his superiors. So, the decision as to the payment of a loss is with the board or officers elsewhere, but the notice and proofs of the loss are expressly required to be given to the local agent. What reason, then, had the plaintiff for imagining, or have we for now holding, that the notice of the further assurance was to be given to any other than the local agent; whether his part then should be to sanction it, or merely to communicate it to others for their instructions or action?

In many such cases the directors, if communicated with by the assured directly, would probably desire the opinion or report of the local agent before exercising their option; and the direct communication by the assured, instead of

being an advantage to the Company, would involve the delay of referring the matter back to the local agent. I do not believe that the Company contemplated or desired such a roundabout mode of transacting this piece of business, any more than any other connected with their policies.

In *Hatton v. The Beacon Insurance Co.*, 16 U. C. R. 316, the policy expressly required, not notice only of the further assurance, but that it should be indorsed on the policy, otherwise the policy was to be void. The defendants' agent (and I understand this was the local agent) had notice of the subsequent insurance, and being asked to endorse a note of it on the policy, he told the plaintiff that it was unnecessary until it should be known whether the Company would accept the risk or not; and this defence not being open to the plaintiff on the pleadings, the Court granted him a new trial, with leave to amend his pleadings. The agent there must have been considered by the Court, not only to have authority to receive such a notice, but to have authority to waive in part the express condition of the policy.

I have a strong opinion that the assured, in the present case, was justified in assuming that the local agent was the proper officer to whom to give his notice of the further assurance.

The notice given was verbal. It was not contended, I think, that it should have been written; the condition did not require it to be a written notice; and in such case it seems clear that a verbal notice is sufficient. I may refer on this point to *Rex v. Justices of Surrey*, 5 B. & Ald. 539; *North British Insurance Co. v. Hallett*, 7 Jur. N. S. 1263; *Wing v. Harvey*, 5 De G. M. & G. 265; *Schenck v. Mercer Insurance Co.*, 4 Zab. N. J. 447; and *McEwen v. The Montgomery Mutual Insurance Co.*, 5 Hill N. Y. 101.

It was further contended on behalf of the Company, that the policy should have been tendered or delivered at the same time that notice was given, in order that the fact of notice might be indorsed on it. This seems to have been

the objection taken at the trial. But notice of the further insurance is one thing, and the indorsement of the memorandum on the policy is quite another thing. The Company might have required both, if they had chosen so to express their condition; but they did not. It appears from the reported cases on both sides of the Atlantic, that some Companies have required such a memorandum to be indorsed, and some have not required any indorsement; some Companies which require the indorsement provide for its being obtained by the assured before the additional insurance is effected; some Companies, content with requiring notice, leave the policy in force until and unless the Company sees fit to cancel it after receiving the notice; some Companies require the assured to obtain the Company's written acknowledgment of having received the notice, and do not require that it should be indorsed on the policy; some mention the officers by whom the indorsement or acknowledgment is to be made; and some are content with receiving notice, and do not even stipulate that it should be in writing. Every Company determines for itself what precise condition it shall exact in regard to further assurances; and every Company which makes any condition on the subject is bound to express in clear and distinct terms what that condition is. The language of the condition being (like the rest of the policy) the language of the Company, it must, if there is any ambiguity in it, be taken most strongly against the Company, according to the recognized doctrine of the Courts on this subject. This Company did not choose to say, that any of its policies should be void if another assurance were effected without its previous consent, or should be void until a memorandum of such further assurance was indorsed on the policy, or should be void unless the assured procured the indorsement to be made within a specified time, or should be void unless the policy be tendered or given with the notice. The Company not having said anything of this kind, and having, on the contrary, selected a form of words which might naturally

and reasonably be supposed by a person insuring to refer to the indorsement as a matter for his own protection alone, and which he might get done if he chose, I respectfully think that it would be unjust to honest persons insuring under this condition, and would be contrary to sound and recognized principles of construction, to hold that there rests on such persons an unexpressed obligation of the kind now contended for by the Company.

On the whole case, I am of opinion that the judgment of the Court below should be reversed.

STRONG, V. C., thought the appeal should be allowed: that the notice to Poussett was sufficient, and that all was properly done to satisfy the condition of the policy.

Appeal dismissed.

BARKER V. TORRANCE ET AL.

Liability of consignors of goods for delay of vessel, as upon an implied contract to receive the goods within a reasonable time. *Barker v. Torrance et al.*, 30 U. C. R. 43, affirmed in appeal.

APPEAL from the judgment in this case discharging the rule *nisi* to enter a nonsuit or for a new trial. The pleadings and facts are fully stated in the report, 30 U. C. R. 43.

Anderson for the appellants, the defendants. (a)

There was no evidence that defendants were consignors, or that Ranney and Inglis, the shippers, were their agents in consigning the goods as they did. *Lennard v. Robinson*, 5 E. & B. 125, and *Cooke v. Wilson*, 1 C. B. N. S. 153, shew that their being called agents in the shipping notes proves nothing; it does not shew whose agents. In the judgment below it is said that there was evidence of

(a) Argued on the 20th January, 1871, before DRAPER, C. J. of Appeal, RICHARDS, C. J.; HAGARTY, C. J. C. P., WILSON, J., MOWAT, V. C., GWYNNE, J., GALT, J., STRONG, V. C.

defendants being both consignors and consignees or assignees of the consignees; but being such assignees would be of no use. The leading cases as to the liability of a consignee for the claim made here are, *Smith v. Sieveking*, 4 E. & B. 945, 5 E. & B., 589; *Young v. Moeller*, 5 E. & B. 755; *Cawthron v. Trickett*, 15 C. B. N. S. 754; and they establish that he may be liable for actual demurrage; but on the principle that the right arises from something in the bill of lading or something done. But further, if they were proved to be consignors as well as consignees, there was still no right of action against any one: *Maude and Pollock on Shipping*, 265-7. As to what is the implied contract in such cases as this, where there is no expressed one, the latest case is *Ford v. Cotesworth*, L. R. 4 Q. B. 137, S. C. in Ex. Ch., 5 Q. B. 544. Before that the cases generally referred to were *Randall v. Lynch*, 4 Camp. 352; *Rodgers v. Forresters*, Ib. 483; and *Burmester v. Hodgson*, Ib. 488; and the later decision seems somewhat inconsistent with them. All the cases however lay it down that a party is not liable on an implied contract such as this in the same way as on an express one, where he contracts for certain lay days. In *Abbott on Shipping*, 11th ed., 268, it is said, "And when the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action of damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part; for he has engaged that it shall be done."—Ib. 273. In *Ford v. Cotesworth*, Blackburn, J., in giving judgment, L. R. 4, Q. B. 136, says, "We are aware of no authority for saying that the law implies a contract to discharge in the usual time, except what is said in *Burmester v. Hodgson*, 2 Camp. 489, in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and ship owner should each use reasonable despatch in performing his part." That case is in the defendants' favor, therefore, if there was no unreasonable delay, and such delay was not established by the evidence.

McLennan, contra. It seems admitted that Glassford, Jones & Co., were the owners of the elevators, and were to provide, and ultimately, but after delay, did provide the barges for unloading. It was proved they were defendants' general agents for receiving grain at Kingston, and for receiving the grain in question. It was also proved that Mr. Torrance paid the freight for this cargo, that the grain at the time of shipment belonged to the defendants; and the bargain with the ship owner was therefore made by the defendants through their agents, who signed the bill of lading. The defendants were therefore the persons who caused the delay by not providing the barges to receive the grain.

DRAPER, C. J., OF APPEAL.—If it is conceded that Glassford, Jones & Co., as agents for the defendants, who were both consignors and consignees, were the persons to furnish the barges, it seems to me there is an end of the matter; the defendants must be liable. That is the only point on which I have had any doubt.

The rest of the Court concurring.

Appeal dismissed.

MICHAELMAS TERM, 35 VICTORIA, 1871.

(November 20th to December 9th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C. B.,
Chief Justice of Appeal (a).

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

DAVIS v. MCKINNON.

Landlord and tenant—Agreement to pay taxes—Yearly tenancy.

Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it, on condition that he should pay the taxes on both lots; and M. accordingly went on, and built, and paid the taxes for several years: *Held*, that a yearly tenancy had been created, and that D. could not eject M.'s sub-tenant without notice to quit.

EJECTMENT to recover possession of the west half of lot 65, in the town of Goderich, tried before Gwynne, J., at the last Goderich Assizes.

The plaintiff claimed title under a deed from one Margaret Davis. Defendant claimed under a lease from one John McPherson, who was a tenant under the same Mrs. Davis.

On the trial the plaintiff's title was admitted, the question being whether defendant was entitled to a notice to quit. It appeared that Mrs. Davis, under the will of one Wilson, had a life estate in the property in

(a) The Chief Justice of Appeal, under the 34 Vic. ch. 9, Ontario, sat during the Term for Richards, C.J., who was absent on account of illness.

question, and that upon her death it went to her daughter Mrs. McPherson: that twelve or thirteen years ago, John McPherson, her husband, requested one Gibbons, one of the executors of Wilson, to obtain from Mrs. Davis her consent to McPherson building upon the lot in question: that Gibbon saw Mrs. Davis: that she was unwilling at first to consent to his building on the lot, but eventually she said if McPherson built on the portion of the land going to his wife he should pay the taxes accruing from year to year upon the lot 65, and also upon lot 21, which also belonged to Mrs. Davis. Mr. Gibbons communicated this to McPherson, and upon that arrangement he went on the lot and built a comfortable dwelling-house and blacksmith's shop. There was no writing between the parties, and no time was mentioned during which McPherson was to occupy.

Another witness testified to conversations with Mrs. Davis in 1857 and 1860. He heard her say she had given McPherson the privilege of occupying the lot, he to pay the taxes, and that he should never be disturbed.

Another witness, a nephew of Mrs. Davis, said he heard her say that if McPherson built on his own lot, meaning 65, he should pay taxes on the two lots; the witness understood that McPherson was to live there as long as he pleased: that he was to pay the taxes on the whole for the privilege of building on his wife's lot; and that if he paid them he might live on the place.

It was proved by the collector that McPherson every year paid the taxes on both lots. It appeared also that Mrs. Davis was aware of McPherson building on and occupying the lot, and that he continued in possession until last spring, when he rented the premises to the defendant for a year (by a lease in writing) from the first of April, 1871, under which defendant entered.

The witness Gibbons also stated that every thing went on quietly until a year or two ago, when Mrs. Davis told him that if McPherson remained longer he must pay rent: that he told McPherson this: that the latter was willing to do

so; and that a lease was drawn, but that Mrs. Davis refused to sign it.

Upon this evidence the defendant's counsel contended that McPherson was a yearly tenant, and entitled to notice to quit, which had not been given; also, that Mrs. Davis permitting McPherson to build operated as an estoppel.

The learned Judge entered a verdict for the plaintiff, with leave to defendant to move to enter a verdict for him, should this Court be of opinion he was entitled to succeed.

During this term, *Harrison*, Q. C., for defendant, obtained a rule *nisi* accordingly.

C. Robinson, Q. C., shewed cause. There was no yearly tenancy. No certain rent was fixed, nor any certain time for payment: *Woodf. L. & T.*, 12th ed., 334, 337; *Parker v. Harris*, 1 Salk. 262; nor was it reserved or made payable to the lessor: *Woodf. L. & T.* 343, 345; *Co. Lit.* 47 b, 143 b; *Lit. sec.* 346; *Pargeter v. Harris*, 7 Q. B. 708; nor could it be called a payment reserved with reference to a yearly tenancy: *Doe Hull v. Wood*, 14 M. & W. 687; *Add. Con.*, 2nd Am. ed., 335; *Braythwayte v. Hitchcock*, 10 M. & W. 494; *Richardson v. Langridge*, 4 Taunt. 130. It is not uncommon in this country to permit a person to occupy land on condition of his paying the taxes, and such agreements are not regarded by either party as creating more than a tenancy at will.

There was clearly no estoppel: *Richardson v. Langridge*, 4 Taunt. 130; *Ramsden v. Dyson*, L. R. 1 H. L. 129.

Harrison, Q. C., contra. *Doe Foley v. Wilson*, 11 East 156; *Doe Sheriff v. McGillivray*, 6 O. S. 189; *Wood v. Manley*, 11 A. & E. 34; *Corporation of Welland v. Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147; S. C. in appeal, ante p. 539, go to shew that the plaintiff having stood by and permitted McPherson to make valuable improvements is estopped.

No rent is necessary to create a tenancy; and at all events, if acts of service may be equivalent to a rent, such

as ringing a bell, &c., as must be admitted, there may be, as here, the service of paying taxes, thus relieving the lessor of a burden: *Doe Tucker v. Morse*, 1 B. & Ad. 365; *Doe Lawson v. Coutts*, 5 O. S. 499; *White v. Nelson*, 10 C. P. 158; *Clayton v. Blakey*, 2 Sm. L. C. 103, 6th ed., all shew that when there is a holding with reference to a yearly payment, as here, it will be construed as a yearly tenancy. In this case it cannot be supposed that McPherson would ever have agreed to go on and build without regarding himself as at least a yearly tenant. What the parties really contemplated was a tenancy during the life of Mrs. Davis.

MORRISON, J., delivered the judgment of the Court.

The question arising in this case is, whether McPherson held the land in question as tenant from year to year; for if he so held, then, as no notice to quit was given, defendant is entitled to have this rule made absolute.

Taking all the evidence together it amounts to this, that Mrs. Davis said to McPherson, "You may occupy lot 65 and live upon it, upon your undertaking to pay the taxes on that lot and lot 21, and so long as you pay the taxes I will not disturb you;" in other words, "If you pay annually for me the amount of taxes for which these lots are assessed;" and that McPherson accepted those terms, and paid the taxes yearly, having built on and occupied the premises for over ten years.

In *Archbold*, L. & T., 3rd ed., 1864, p. 217, it is laid down, "A tenancy from year to year is either created by express stipulation between the parties (as where it is agreed between them that the tenant shall hold from year to year, so long as both parties please), or it is implied by law. If it be agreed that the tenant shall pay so much a year for the premises, without mention of any term, it shall be deemed a tenancy from year to year."

It was argued that at most it was a mere tenancy at will that was created, and that both parties had determined the will. As said by DeGrey, C. J., in *Roe v. Lees*, 2 W. Bl. 1173, "all leases for uncertain terms are *primâ facie* leases at

will ; it is the reservation of an annual rent that turns them into leases from year to year." Now here the payment to be made by McPherson was a periodical one, and it cannot be accounted for upon any other ground than that it was paid as compensation and rent, and to create the relation of landlord and tenant. It could hardly be said that it was the intention of these parties that in any year, say the day after McPherson paid these taxes, that Mrs. Davis could turn him out of possession, or that on paying the taxes he was not to hold for the current year. If the agreement had been under seal it would have operated as a lease for Mrs. Davis's life. If the parol agreement had been to pay Mrs. Davis every year an amount equal to the amount of taxes assessed against the two lots, that would certainly be a rent, and create a tenancy from year to year. We cannot see any difference where it is agreed that the amount should be payable direct to the collector. It is a payment for the benefit of the owner and landlord, and the stipulated compensation of the latter for the occupation of the premises. The compensation has all the attributes of rent ; an annual payment, which could be reduced to a certainty, and payable on account of the enjoyment of the land.

On the whole, we are of opinion, from the evidence given at the trial, that the relation in which McPherson stood to Mrs. Davis was that of a tenant from year to year ; and, as the plaintiff claims under Mrs. Davis, that before McPherson or his tenant, the defendant, can be ejected, the tenancy must be determined by a notice to quit ; and as none was given, the defendant is entitled to have the verdict entered for him.

Rule absolute.

EDDY V. THE OTTAWA CITY PASSENGER RAILWAY COMPANY.

Street railway—Obligation to keep rails level with highway—29-30 Vic. ch. 106, secs. 5, 9.—Costs of appeal—Grounds of appeal.

The defendants' charter compelled them to lay their rails flush with the street, and to make their track conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the street.

Held, reversing the judgment of the County Court, that having so laid the rails, they were not bound to alter and adapt them from time to time to changes in the level of the street; and therefore that they were not liable for an accident arising from the street having become worn down by traffic, so as to leave the rail, which remained as originally laid, several inches above the level.

The appeal was allowed *with costs*. See p. 576, note *a*.

Appeals will not in future be heard unless the grounds of appeal are entered on the appeal books when delivered.

APPEAL from the County Court of Carleton.

Declaration. For that after the passing of the Act of the late Province of Canada, passed in the year 1866, entitled "An Act to incorporate the Ottawa City Passenger Railway Company," and before and at the time of committing the grievances hereinafter mentioned, the defendants were, and still are, owners of a certain railway, running upon and along a certain street and highway called Duke Street, in the City of Ottawa; and it was the duty of the defendants to lay the rails of their said railway flush with the said street, and to conform their said railway track to the grade of the said street, so as to offer the least possible impediment to the ordinary traffic of the said street; yet the defendants disregarded their duty and the said statute, and did not lay or maintain the rails of their railway flush with the said street, nor conform the said railway track to the grade of the said street, so as to offer the least possible impediment to the ordinary traffic of the said street; but, on the contrary, wrongfully and negligently, and contrary to the said statute, laid and permitted the said rails to be and remain above the said street, not conforming to the grade thereof, and so as to offer unnecessary impediments to the ordinary traffic of the said street; whereby the plaintiff, whilst he

was lawfully driving along the said street, and without any default on his part, drove his waggon against the said rails, and broke the axle, and otherwise strained, broke, and injured the said waggon, and the plaintiff incurred expenses for repairing the said waggon, and was deprived for a long time of the use thereof, and was hindered in his business.

Plea,—Not guilty, by statute 29–30 Vic., ch. 106; 31 Vic., Ont., ch. 45; Consol. Stat. C. ch. 66, sec. 83, all public Acts.

The evidence was to the following effect :

Charles Hynds said : I was driving along Duke Street, on the morning of the 15th October, 1870, with a load drawn by three horses, the wheels running outside of the switch, and in trying to drive over the rails my axle broke. The axle was of iron. The top of the rail was five inches above the ground on which the rail lay at the place. I was giving way to other teams I was meeting. The van or waggon was large, too wide to run between the rails, but not wide enough to run with the wheels outside the rails; the road was soft and bad at the time. The road was good for some time, and it was level at the place where I crossed before the accident. The road was cut down by driving in some places; this was one of the places. The rails were originally laid down level with the street.

Anthony Charette said : I was conductor of the car or waggon when the accident happened. I found the rail about four inches above the level of the street. The driver was trying to get on to the switch; the road was bad at this place for some time before, but it was repaired immediately after the accident. The wheel was twisted out of shape. The rail was some inches above the road in several places on that street. The waggon is extra large and heavy, and wider than an ordinary waggon. We had about 4500 pounds on the waggon. We generally carry about 5000 pounds. The road was cut down by the public traffic.

It was proved that the waggon cost \$850; and was not an ordinary one.

George Perry said : I am street surveyor and civil

engineer. The rails were originally laid with the level of the street, but the street was not then graded. I think the road was laid at first so as to offer no extraordinary impediments to ordinary vehicles travelling on the street. The rails are the same as the first. Defendants applied to me for the grade of the streets. I am city engineer. I referred them to the council. I got no orders to furnish the grade. I believe the rails were originally laid level with the streets as they then were. The plaintiff's van is more than the width of an ordinary vehicle.

The defendants' counsel moved for a nonsuit, on the ground that the defendants had done nothing to impede the ordinary traffic of the streets: that they were not responsible for the accident, as they were not bound to keep the streets in repair; and because the vehicle was not an ordinary, but an extraordinary one.

The learned Judge refused to nonsuit, and he directed the jury that the defendants were bound to keep their track in the manner the law requires them to lay it in the first instance: that they were bound to keep their rails in such a way as not to cause the accident, and if they neglected to do so they were liable for the damage.

The defendants' counsel objected to this part of the charge.

The verdict was for the plaintiff and \$40 damages.

In the following Term the defendants obtained a rule *nisi* to enter a nonsuit, on the grounds before stated; or for a new trial, because the verdict was against the weight of evidence, and for misdirection, because the learned Judge directed that the defendants were bound to keep that portion of the streets over and along which their railway track was laid at all times in repair, notwithstanding that the rails were originally laid down as required by the terms of their act of incorporation.

The rule was after argument discharged.

The learned Judge in disposing of the rule said: "I told the jury that defendants were not only bound to lay their track level with the street, but that they were bound to

keep it so as not to interfere with the ordinary traffic of the streets, and if the plaintiff's waggon was such a one as might be lawfully used on the streets, and got damaged in consequence of defendants' rails being permitted to offer impediments to the ordinary traffic, they were liable in damages. Neither the statute of 1866 nor that of the Ontario Legislature passed in 1868, ch. 45, justify the defendants in permitting their rails to remain in such a state as to cause impediments to ordinary traffic, and although the plaintiff's waggon was something heavier and wider than an ordinary farmer's waggon, it was still a vehicle which might be lawfully used for its own purpose. And that the defendants were answerable for the damage occasioned by allowing their rails to remain in the state they were according to the evidence, offering impediments to ordinary traffic; and although their waggon was too wide to run on the defendants' track, that was no reason why it should be obstructed in moving along the public street and crossing the track whenever necessary.

I think the verdict is neither contrary to law nor evidence, and that that was no misdirection; and I discharge the rule with costs."

From this judgment the defendants appealed.

Harrison, Q. C., for the appellants. The defendants' obligations must be determined by their charter, 29-30 Vic. ch. 106. There are different provisions for different Companies. The Toronto Street Railway Company, for example, are bound by their Act, 24 Vic. ch. 83, and by a by-law of the City passed under its provisions, to keep the street in repair between the rails, and for eighteen inches on each side outside of them: see *Attorney General v. That Company*, 14 Grant 673, 15 Grant 187. The dictum in 14 Grant 675, that the rails must be kept as far as practicable in the state described by the Statute, can apply only as against that Company. There is no such obligation under defendants' charter. It says only, sec. 5, that the rails shall be laid flush with the street and the track shall conform to the

grades of the same, so as to offer the least possible impediment to the ordinary traffic of the street. Section 9 says that the track shall conform to the grades of the streets, and the Company shall not in any way change or alter the same. If the Company once lay their track flush with the level of the street, they are not bound afterwards to adapt it to the grade of the street, as it may change or be worn away by traffic; it is not said that they shall construct and *so maintain* their track, and such an obligation would be unreasonable, for they have no right to interfere with the highway, and each Spring or Fall they would have to alter their rails. In *Regina v. The Toronto Street Railway Co.*, 24 U. C. R. 54, the evidence shewed that the rails never had been laid flush with the road. In this case the road was out of repair, not the railway track, and the vehicle was not an ordinary one. The corporation, therefore, are liable, if any one, for it is their duty to keep the road in repair.

S. Richards. Q.C., contra. It can never have been intended by the Legislature, in incorporating this Company, to impose any additional duty on the municipality, and to compel them to keep their street always up to the level of the railway track, as is contended for by the defendants. The plaintiff could not sue the municipality, for but for the railway there would have been no accident. The municipality was not bound to keep the street up to the level of the track. The duty was the other way; the Company were bound to keep their track level with the street. The ordinary traffic is interfered with when the track is not kept flush with the level of the street.

WILSON, J., delivered the judgment of the Court.

The statute of 1866, sec. 5, enacts that "The rails of their railway shall be laid flush with the streets and highways, and the railway track shall conform to the grades of the same so as to offer the least possible impediment to the ordinary traffic of the said streets and highways." And section 9 enacts that "The said Company, in the construction of the said railway track, shall conform to the grades

of the various streets through which the said track shall run, and shall not in any way change or alter the same."

The 31 Vic. ch. 45, Ontario, amending this Act, though it incorporates many of the clauses of the General Railway Act, has no bearing on this suit.

The first question is to determine what the facts were.

Was it the railway track or the highway which was out of condition? The rail of the track was certainly higher at the place where the accident happened by several inches than the street was. But it appears the rail track was originally laid level with the street as it then was; but the street was not then graded, and so as to offer no extraordinary impediment to ordinary vehicles, and that the rails were the same *as the first*: that is, as I understand, the rails remained the same as at first laid. The road was good for some time, and it was level at the place where the waggon crossed before the accident;—the meaning of which I take to be: before the accident, and for some time before it, the road was level with the rail track, and it was so at the place where the accident happened at the time before the accident when the teamster last crossed it.

It then appears the road was cut down, by driving, in some places, and that the place of the accident was one of those places so cut down. Another witness said the road was cut down by the public traffic.

I assume then that the railway track was originally laid level with the street, so as to offer no impediment to the ordinary traffic upon the street, and that the track has continued just as it was at first laid up to the time of the accident; but that the street at the place of the accident was cut down by the public traffic so as to be several inches below the level of the rail track.

The rails having been laid flush with the street, and the track having conformed to the grades of the same so as to offer the least possible impediment to the ordinary traffic of the street, the defendants have violated no provision of the fifth section of the Act, nor any part of the ninth section, which repeats that part of the fifth section about con-

forming to the grades. The ninth section has also the words that the Company "shall not in any way change or alter the same:" that is, as the track when first laid must conform to the grades of the streets, the Company must not vary from these grades by any future change or alteration. The Company have not changed their track. The evidence shews that shortly before the accident the street and the rail track conformed to each other.

The difference in their level was occasioned by no act of the defendants, nor by any change or alteration of their track, nor by reason of its being out of repair; but by reason of the street having been cut down by and from the public traffic upon it. It does not even appear that the municipality has ever altered the grade of the street since the railway was constructed, and there is no evidence that it desires to do so.

We cannot see why the defendants should be liable for an accident happening to the plaintiff from such a cause.

It was said by Mr. Harrison in argument, that the City of Toronto had bound the Toronto Street Railway Company to keep the street in repair between the rails, and to a distance of eighteen inches on each side of the outer rail. This would seem to be a very provident arrangement, for it avoids all disputes between the municipality and the Company, and it imposes the burden on the party who ought properly to bear the wear of the road at the point of junction between the rail and the highway where it is the greatest.

Under the Railway Act, Consol. Stat. C. ch. 66, sec. 12, railway companies may, with the consent of the municipalities, lay their track along highways, and if the rail do not rise above nor sink below the level of the highway more than one inch, it shall not be deemed an obstruction. The rail track may, however, be laid across a highway without leave, so long as it does not interfere with the highway by the rails being more than one inch above or below the level of the highway.

In these cases of conflicting interests they may not be always reconcilable. The municipalities have the general

right to raise and lower the level of roads and streets, and to widen and alter them as they may please. But after other parties have lawfully acquired an interest or easement in them, it seems to be very questionable whether the municipality can, after a railway, either a street or a general railway, has been constructed, so alter the grade or level of a street as to leave the railway in a channel, or elevated on a bank. If, however, this can be done, there is then the further question, whether the railway company can be required to tear up their track, and cut down or fill it up so as again to bring the road and the railway into conformity. I very much doubt whether there can be any such interference with legally acquired and vested interests.

Under the 14th section of the Act of 1866, the City of Ottawa and the adjoining municipalities are authorized to make any agreement with the Company relating to the macadamizing, repairing, and grading the streets and highways, &c., to be traversed by the railway. But no such agreement has been shewn to have been made in respect of such matters.

This case might probably be more considered if it were necessary to settle the principle which might be held to govern the conflicting interests of these different bodies. No such question arises here. We decide the case simply upon the evidence, and upon it we entertain no doubt that a nonsuit should have been and should now be entered for the defendants.

The appeal will therefore be allowed, and the learned Judge in the Court below will rescind the rule discharging the defendants' rule *nisi*, and make the same absolute to enter a nonsuit, with costs (a).

(a) *S. Richards*, Q C., opposed giving costs to the appellant, urging that it had never been the practice to do so, though admitting it to be clearly a matter of discretion, under Consol. Stat. U. C. ch. 15, sec. 68. The Court, however, after some discussion, decided to allow them. This, it is believed, is the first case in which costs have been given under that Statute to a successful appellant, our practice having differed from that in England, where the general rule is that the successful party, whether appellant or respondent, is entitled to his costs. See *Outhwaite*, appellant, *Hudson*, respondent, 9 Ex. 380; *Mountnoy v. Collier*, 1 E. & B. 641; *Schroder v. Ward*, 13 C. B. N. S. 410; *Ch. Arch. Prac.*, 12th Ed., 1731. See also *Shaver v. Hart*, *post* p. 609, note a.

This case was heard although no reasons for the appeal were stated upon the appeal books when entered. We have allowed them to be entered upon the argument; but we trust this will be the last time that appeals are entered without the reasons accompanying them, and we wish it to be understood that we shall not hear any case for the future without the reasons being furnished at the time of the delivery of the appeal books.

Appeal allowed, with costs.

MCDONALD V. STUCKEY.

Notice of action—Necessity for quashing conviction.

Held, following *Neill v. McMillan*, 25 U. C. R. 485, that a notice of action describing the plaintiff's residence as of the township of B., in the county of P., was sufficient.

Held, also, following *Haacke v. Adamson*, 14 C. P. 201, that an order or conviction not under seal need not be quashed, under C. S. U. C. ch. 126, sec. 3, before action brought, for any thing done under it.

The alleged conviction in this case was made under the supposed authority of C. S. U. C., ch. 75; but nothing appeared on the proceedings to shew the relation of master and servant, or any offence punishable under the Act.

THE first count of the declaration charged that defendant, on the 2nd December, 1870, caused the plaintiff to be assaulted and imprisoned, and kept him in prison for a long time.

Second count: that defendant, being a Justice of the Peace, without any authority, and maliciously, and without reasonable or probable cause, caused the plaintiff to be assaulted, and to go and be conveyed through divers public streets, &c., to defendant's residence, and there imprisoned and kept him in custody, without any reasonable or probable cause, for a long time, at the expiration whereof defendant caused the plaintiff to be conveyed in custody to the common gaol, and there again imprisoned for, to wit, five hours, under a false charge that the plaintiff had committed an offence, to wit, that he did owe to

James Thompson the sum of \$51.08 for labour, and would not pay or settle the same, and that James Thompson swore that he believed the plaintiff was about leaving the country, whereby, &c. Damages laid at \$1,000.

Plea, not guilty, by statute 16 Vic., ch. 180, sections 1 to 13, both inclusive; Consol. Stat. U. C. ch. 126, sections 1 to 20, both inclusive. Public Acts.

The case was tried at Guelph, before Hagarty, C. J. C. P., in March, 1871.

It was proved that the plaintiff was committed to the county gaol at Guelph, on a warrant under the hand and seal of the defendant, which recited that the plaintiff was charged before the defendant, for that he "did owe to James Thompson the sum of \$51.08 for labour, and would not pay or settle the same, and that the said James Thompson swears that he believes that the said Alexander McDonald is about leaving the country." Dated 2nd December, 1870.

The plaintiff swore that he was brought under a warrant before defendant, at Fergus, and kept at that place in custody all night. Defendant told the constable to take him (plaintiff) to Guelph, to gaol, on the following day. The constable had defendant's warrant to take him there. The constable delivered the warrant and the plaintiff to the turnkey. Defendant said it was for his owing \$50 the plaintiff was to go to gaol. Plaintiff said he would pay it, but not till pay-day. Plaintiff was five or six hours in gaol.

On the defence the Clerk of the Peace produced certain papers, which had been transmitted to him by the defendant on the 20th of January, 1871. On the morning of the day of trial, a conviction was filed with him. The papers returned on the 20th of January were, 1. An information; 2. An order for the payment of money; and 3. Examination of witnesses before the defendant. This last paper contained little more than the reiterated statement of the defendant that he did not owe Thompson so much as he claimed by \$5: that he had offered Thompson a note on

Ellice, the Engineer, for his pay, and Thompson would not take it; and now that he would sooner go to gaol than pay Thompson one cent.

The order for payment stated that on the 1st of December, 1870, complaint was made before the defendant (not saying by whom) that the plaintiff owed to James Thompson the sum of \$51.08, and refused to pay, "and the said Thompson swears that he believes him to be leaving the country:" that the parties aforesaid appeared before the defendant, and that defendant did adjudge the plaintiff to pay to James Thompson the sum of \$51.08 (a blank was left as to costs, and no adjudication thereof), "and if the said several sums be not paid" (another blank) "then I adjudge the said Alexander McDonald to be imprisoned in the common gaol of the said county of Wellington (and there kept to hard labour) for the space of" (another blank) "unless the said several sums, and all costs and charges of the commitment and conveying of the said" (another blank) "to the said common gaol shall be sooner paid." This instrument was not under seal.

It was admitted that a sum of \$10 was tendered by defendant's attorney to the plaintiff's attorney before action in compensation, as a tender of amends.

The indorsement of the name, &c., of plaintiff's attorney, and of the plaintiff himself, on the notice of action was, "Edward O'Connor, of Office No. 8, Day's Block, Wyndham Street, in the town of Guelph, in the county of Wellington, attorney for Alexander McDonald, of the township of Blanshard, in the county of Perth."

It was objected for defendant that no action would lie, the conviction not having been quashed, and that the indorsement of the plaintiff's residence on the notice of action was insufficient.

Leave was reserved to defendant to move on these objections; and the jury found a verdict for the plaintiff, and \$75.

In Easter Term last, *S. Richards*, Q.C., obtained a rule

calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to the leave reserved, on the ground that the conviction or order relied upon or proved at the trial had not been quashed before this action brought, and that the notice of action was insufficient.

Anderson shewed cause. The notice of action is sufficient: *Neill v. McMillan*, 25 U. C. R. 485. *Haacke v. Adamson*, 14 C. P. 201, shews that the alleged conviction or order here not being under seal, it was unnecessary to quash it before action, for it was in point of law no conviction: Consol. Stat. C., ch. 103, sec. 42. But at all events it is not such an order or conviction as it could have been intended should be quashed. In *Graham v. McArthur*, 25 U. C. R. 478, it was held that a conviction made by one magistrate, when two only had jurisdiction, must be quashed, although void. But this was a conviction which no magistrate, nor any number of magistrates, had a right to make. Suppose the magistrate had ordered the constable to take the plaintiff out of Court and give him a thrashing; it surely could not be necessary to quash such an order before suing, and this is in effect the same case.

S. Richards, Q.C., contra. The order should have been quashed. It is not a case where there is no semblance of jurisdiction. Consol. Stat. U. C., ch. 75, secs. 3, 4, 7, 12, give the magistrate summary jurisdiction in matters between master and servant; and though this order may not have been authorized, it was not the extreme case supposed. In *Graham v. McArthur* the one magistrate had no jurisdiction whatever in the matter, under any circumstances: *Ranney qui tam v. Jones*, 21 U. C. R. 370; *Lindsay v. Leigh*, 11 Q. B. 455.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

As to the notice of action, we think this case cannot be distinguished from that of *Neill v. McMillan*, 25 U. C. R. 485, cited by Mr. Anderson. We refer also to *Oram v. Cole*, 18 C. B. N. S. 1.

Then as to the alleged conviction, it is not under seal, and no application was therefore necessary, according to *Haacke v. Adamson*, 14 C. P. 201, to quash it.

The defendant's counsel referred to sec. 12 of Consol. Stat. U. C., ch. 75, as giving authority and jurisdiction. This Act authorizes a justice of the peace, on complaint of any servant or labourer against his employer for non-payment of wages, among other things, to take cognizance of the matter, and on due proof of the complaint to discharge the complainant from the service, and to direct the payment to him of any wages found to be due, not exceeding \$40, and to make such order for the payment as to him seems just, with costs; and, in case of non-payment for twenty-one days after such order, to issue a warrant of distress to levy the same.

But it does not appear from the complaint, the order or conviction, or the commitment, that Thompson was either servant or labourer of the plaintiff, nor is the word "wages," or its equivalent, once used in any of these proceedings. The defendant's order, which is relied on as a conviction, refers to the complaint upon which it professes to be based in these words: "The information and complaint of James Thompson," who saith "that Alexander McDonald owes him \$51.08, and the said James Thompson *belives*" (*sic*) "him to be leaving this part of the country, and not paying or settling the same."

The rule must be discharged.

Rule discharged.

REGINA V. CURRIE.

Perjury—Jurisdiction—32–33 Vic. ch. 23, sec. 8, D—Construction of.

Sec. 8 of 32–33 Vic., ch. 23, sec. 8, D, applies to all cases of perjury, not merely to "Perjuries in Insurance cases," which is the heading under which secs. 4 to 12 are placed in the Act.

Held, therefore, that a magistrate in the County of Halton had jurisdiction to take an information, and to apprehend and bind over a person charged with perjury committed in the County of Wellington.

Held, also, that a recognizance to appear for trial on such charge at the Sessions was wrong, as that Court has no jurisdiction in perjury; but a *certiorari* to remove it was refused, as the time for appearance of the party had gone by.

Harrison, Q.C., moved for a *certiorari* directed to W. D. Lyon, Esquire, one of the justices of the peace in and for the County of Halton, and other the justices and keepers of the peace in the said County, and to John Dewar, Esquire, Clerk of the Peace and County Crown Attorney for the same County, for the removal of the information, depositions, commitment, and recognizance, and other papers in the above matter, into this Court; on the ground that the Magistrate had no authority to take the information, or to arrest, and had no jurisdiction whatever, because the alleged perjury complained of appeared to have been committed in the County of Wellington, and not in the County of Halton, where the proceedings were taken; and on the ground that the recognizance was that John Currie should appear at the next Court of General Sessions for the County of Halton, and plead and take his trial for the said offence; and a charge for perjury could not be tried at the Sessions of the Peace.

Ferguson appeared on the notice of motion, and shewed cause for the Magistrate and County Attorney. The Dominion Act, 32–33 Vic., ch. 23, sec. 8, shews that the Magistrate of and in Halton had authority to receive the information and apprehend John Currie, for it is expressly enacted that "any person accused of perjury may be tried, convicted and punished in any district, County or place where he is apprehended or is in custody;" and John

Currie, it appears, was apprehended in Halton. He referred also to the Dominion Acts of the same session, ch. 30, secs. 1, 11, 46; and ch. 29, sec. 7. The recognizance was probably not correct in binding the party to appear and take his trial at the Sessions of the Peace.

Harrison, Q.C., in reply. Section 8 of chapter 23 is under a general heading of "Perjuries in Insurance Cases," and this is not an insurance case. Such headings may be referred to to determine the meaning and application of the sections where any doubt exists: *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 171. The defendant is entitled at any rate to have the recognizance removed and quashed: *Regina v. The Justices of the West Riding of Yorkshire*, 7 A. & E. 583; *Regina v. Groves*, 8 L. T. N. S. 311; for the Sessions of the Peace could not try the offence of perjury: *Rex v. Haynes*, R. & M. 298; *Burn's Justice of the Peace*, 30th Ed., "Perjury," V.; "Sessions of the Peace," IV. (1) (a). He also referred to *Symonds v. Dimsdale*, 2 Ex. 533; *Regina v. Hodgson*, 12 W. R. 423.

WILSON, J. delivered the judgment of the Court.

Notwithstanding the sections of chapter 23, from 4 to the end of the statute, being under the heading of "Perjuries in Insurance cases," it is manifest, on a perusal of these different sections, that only sections 4 and 5 at all relate to insurance cases. Not one of the other sections is governed or affected in the least by that heading.

If these other sections could be held to be within the operation of that heading, then the last, or 12th section, must also be within it, which declares that "this Act shall commence and take effect on the first day of January, 1871," for that is not more dissimilar from the heading than the provisions of the sixth and following sections are.

The magistrate had full authority to take the information, and to apprehend and bind over the person charged, under the eighth section of the Act.

(a) See also *Regina v. McDonald*, ante, p. 337.

The recognizance, however, to appear at the Sessions of the Peace for his trial, we think was not the proper recognizance to take, as we think the Sessions of the Peace have not authority to try the offence of perjury—*Regina v. Haynes*, R. & M. 298 ; and *Ex parte Bartlett*, 7 Jur. 649—as it is not an offence which at the common law is, or is accompanied by, a breach of the peace.

There can be no object in granting the writ now, as the time for appearance of the party has gone by, and it cannot now be enforced against him. We probably should not have granted it even if the day had not elapsed, if an undertaking from the proper authority had been given that it would not be enforced. It is said the granting of a *certiorari* is not of right, but is grantable in the exercise of a sound legal discretion: *Re Mayo County*, 14 Ir. C.L. Rep. 392.

The rule will therefore be refused, and without costs.

Rule refused.

WYCOTT V. CAMPBELL.

Commission on sale of land—Right to recover—Terms specified not obtained—Common counts—Waiver of notice for jury—Law Reform Act of 1868.

Defendant agreed with the plaintiff that if the plaintiff would find him a purchaser for his farm at \$6,000, and get not less than \$1,000 down, he would pay him \$200. The plaintiff found a purchaser at \$6,000, who paid only \$500 down, but the defendant accepted and sold to him, and it was proved that after the sale defendant promised the plaintiff to pay him the \$200. The Judge of the County Court, before whom the case was tried, without a jury, having found for the plaintiff for \$200 upon the common count :

Held, on appeal, that defendant having accepted and dealt with the purchaser found by the plaintiff, though not such a purchaser as the agreement called for, the plaintiff was entitled to recover the value of his services on the common count ; and that, as defendant had promised to pay the \$200, the verdict was right.

The Law Reform Act of 1868, sec. 18, sub-sec. 3, enacts that it shall be competent for the parties at a trial to consent that the notice for a jury shall be waived, and the case tried by the Judge, “and to endorse a memorandum of such consent on the record ; and thereupon” the Judge shall try, &c. The plaintiff had given notice for a jury, but at the trial the counsel on both sides waived it, and requested the Judge to try the case, which he did, and found for the plaintiff, but no memorandum was endorsed. On objection by the plaintiff to the Judge’s authority to try :

Held, that the record might be amended by the Judge’s notes, which stated the waiver and consent, and the endorsement of the memorandum made *nunc pro tunc*.

APPEAL from the County Court of the County of Lennox and Addington.

Declaration on the common counts. Pleas: Never indebted; and accord and satisfaction, on which the plaintiff released defendant by deed.—Issue.

The plaintiff's attorney gave a notice that he required the issues to be tried by the jury.

The learned Judge returned, as part of his notes of the trial, the following fact: "Both parties waive a jury, and request the case to be tried by the Judge;" upon which the Judge tried the cause without a jury.

The plaintiff claimed to recover \$200 for selling and finding a purchaser for defendant of land belonging to defendant.

The plaintiff proved the agreement to be, that if he would find a purchaser for the defendant's farm at \$6,000, and get not less than \$1,000 down, and the rest on time, the defendant would pay him \$200.

The plaintiff did find a purchaser at the price of \$6,000, and defendant accepted him and dealt with him; but the purchaser did not pay \$1,000 down, but \$500 only. There were promises proved by defendant to pay the plaintiff the \$200 after the sale so made.

A nonsuit was moved for, on the ground that the plaintiff was not entitled to be paid, as the \$1,000 had not been paid down; and that, as the contract had not been performed, he could not recover on the common counts.

The learned Judge reserved leave to move to enter a nonsuit if the objection could be sustained, and he found a verdict for the plaintiff for \$190, being the \$200 less \$10 paid by defendant on account.

The defendant's counsel in the following Term obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, or a new trial had, on the objection before mentioned, and because the verdict was against evidence and the weight of evidence, and contrary to law, and perverse; or why proceedings on the verdict should not be restrained, on the ground of mis-trial, in that the venire and

notice requiring a jury on the record required that the issues should be tried by a jury, and such notice was not waived, and no memorandum of any consent to waive it was endorsed on the record, and the issues were tried by the presiding Judge, and a verdict rendered by him, and not by a jury; or why the judgment should not be arrested, for the reasons last mentioned.

The rule after argument was discharged, and the defendant appealed.

This reasons for appeal were to the following effect: that the agreement was to pay the plaintiff \$200 on his finding within a month or two a purchaser for defendant's farm for \$6,000, who should pay at least \$1,000 down, and the intendment was that the plaintiff should receive nothing if he did not strictly perform his bargain: that having failed to perform his contract, the plaintiff should have declared specially upon it, shewing that a strict compliance with it was not necessary: that the plaintiff performed only one of the three terms of his contract, which was not a substantial performance of it: that the fact of the defendant altering his terms of sale because he could do no better, was not an acceptance of performance by the plaintiff of his contract, but if it were, these facts should have been specially declared upon: that the promise by the defendant after the sale does not make him liable for the \$200, that being recoverable only under the conditional contract: that the agreement by intendment shewed the plaintiff was to get nothing if he did not strictly perform his contract, but if the plaintiff is to recover on a *quantum meruit*, the \$10 paid to him shews it was the full sum he was entitled to: that the plaintiff cannot recover on the evidence on the common counts: that the want of a written consent to waive the trial by jury, and to try the cause by the Judge, endorsed on the record, avoids the verdict—that it constitutes a mistrial, or is ground for arresting the judgment: that the counsel, in the absence of and against the wish of the parties and their attorneys, could not waive the notice for a jury, and the written consent waiving the trial by jury

should have been endorsed on the record before the Judge could try the cause.

Harrison, Q. C., for the appellant. As to the effect of trying a case without a jury: the plaintiff gave notice requiring a jury, but the Judge tried the case himself by consent of the counsel on both sides. The Law Reform Act of 1868, 32 Vic., ch. 6, sec. 18, sub-sec. 3, says, that when such notice has been given the cause shall be tried as before the statute, but "that it shall be competent for the parties present at the trial to consent that the said notice shall be waived and the case tried by the Judge, and to endorse a memorandum of such consent upon the record, *and thereupon* the said Judge shall proceed to the trial * * without the intervention of a jury." This waiver, then, must be by consent of the parties, and the clause only authorizes the Judge to try when they have endorsed the memorandum; it gives him no power to endorse it. The endorsement is the condition on which he acquires jurisdiction, and the consent will not confer it unless the statute is complied with: *Humphreys v. Hunter*, 20 C. P. 456.

Then as to the plaintiff's right to recover. He was not entitled to the commission, for he did not substantially perform the contract. The promise to pay was conditional, according to the plaintiff's statement, on his getting a purchaser who would pay \$1,000 down, and this he did not do. The cases shew that the right to commission, which is frequently, as in this case, a large sum for little trouble, must be strictly proved: *Mason v. Clifton*, 3 F. & F. 899; *Antrobus v. Wickens*, 4 F. & F. 291; *Fullwood v. Akerman*, 11 C. B. N. S. 737; *Toppin v. Healey*, 11 W. R. 466. *Baker v. Vanluven*, 14 C. P. 214, was relied upon in the judgment below, but that case, it is submitted, is not law. The defendants there agreed to subscribe towards building a church 30 feet wide by 40 feet long, to cost \$1,000; it was built 36 x 48, at a cost of \$1200; and it was held that they were nevertheless bound to pay. The authorities cited by

the learned Judge of the County Court in that case seem conclusive in favor of the defendants; and as the decision could not be appealed from, it may be questioned here.

Reeve, contra. The defendant did not ask for a jury, and when the plaintiff who demanded it waived his demand the defendant, who never wanted a jury, cannot object to the mode of waiver. Where one only demands he can waive his right without the consent of the other; but where both demand both may be required to waive. The only mandatory words in the clause are to the Judge, and he alone can object to the memorandum not being endorsed. Moreover the assent need not be endorsed, but only a memorandum shewing that it has been given. The consent may be verbal, as is plain from its not being required to be signed; but it must be evidenced by an endorsement, and the Judge, who has possession of the record, is the proper person to make the endorsement on it; and it may be allowed to be made now, by way of amendment, *nunc pro tunc*. In *Jones v. Smith*, 23 U. C. R. 485, the parties agreed to leave the case to the Judge, upon whose decision judgment was entered as upon a verdict, which was held to be erroneous; but it will be seen, on reading the judgment, that the decision would have been otherwise if the Act now in operation had been then in force. At all events such an objection as this can be taken only by error, not on motion: *Regina v. Kennedy*, 26 U. C. R. 326; *Ambrose v. Rees*, 11 East 370. See also *McColl v. Waddell*, 19 C. P. 213.

As to the merits, the plaintiff is certainly entitled to something, for the defendant accepted the purchaser found by him, and thus took the benefit of his services, for which the plaintiff can recover on a *quantum meruit*. The objection urged below was, that there was no cause of action on the common counts; but that is clearly the proper form of action. There was no objection on the ground of excessive damages, and the verdict therefore must stand if the plaintiff is entitled to anything: *Lucas v. Godwin*, 3 Bing N. C. 736; *Diamond v. McAnnany*, 16 C. P. 9; *Cutter v. Powell*, 2 Sm. L. C. 1.

WILSON, J., delivered the judgment of the Court.

The learned Judge pronounced a very full and well-sustained decision in favour of the plaintiff on his right to recover on the common counts, just because he could not have recovered by reason of his non-literal performance of the terms of the original contract; inasmuch as the defendant had accepted the benefit of the plaintiff's services, and had, notwithstanding the payment of only \$500 by the purchaser, instead of \$1,000, promised the plaintiff to pay him the commission he had engaged to give; and that no complaint was made of the amount of the verdict, but as to the right to recover anything whatever, and there was evidence to sustain a claim on the *quantum meruit*. The learned Judge declined also to give effect to the want of a writing waiving a jury, after all that had been done by the assent of the parties.

The contract between the parties is not assented to in terms as it is represented by any of the parties. The plaintiff says he was to receive \$200 if he found a purchaser for defendant's farm, who would give \$6,000 for the farm, and pay \$1,000 down.

The defendant says the bargain was that the plaintiff was to get \$200 if he found a purchaser who would give \$6,000 for the farm within two months, and pay \$2,000 down, and that the plaintiff was to get nothing if he did not perform such a service.

The learned Judge found the contract to have been as described by the plaintiff; and he found that the plaintiff, although he did find a purchaser who would give \$6,000 for the farm, did not find one who would pay \$1,000 down, but one who would pay \$500 down only.

The parties could have agreed, as the defendant says they did, that if the plaintiff did not effect what he engaged to do, he should get nothing for his services: *Toppin v. Healey*, 11 W. R. 466; or they could have agreed for one rate of remuneration if the plaintiff brought about a sale, and a different rate for the services he rendered if he were unsuccessful: *Green v. Bartlett*, 14 C. B. N. S. 681.

The legal effect of the agreement, as the plaintiff described it, was that he should be paid only if he were successful, and be paid nothing if he were not : *Read v. Rann*, 10 B. & C. 439 ; *Antrobus v. Wickens*, 4 F. & F. 219 ; *Prickett v. Badger*, 1 C. B. N. S. 296.

The plaintiff in this case did unquestionably find a purchaser for the defendant who would give, and did give, \$6,000 for the farm, and he found such purchaser within four months from the time of the commission contract, but the purchaser was one who did not or could not pay \$1,000, as had been stipulated for between the plaintiff and defendant, but \$500 only.

The defendant accepted the purchaser so found by the plaintiff at the \$6,000, and he took from him the \$500, instead of the \$1,000.

In such a case the plaintiff did not perform his contract so as to be entitled to the specific remuneration of \$200. But the question is not so much whether he should get the \$200, as whether he should get anything.

The defendant contends that, although he received the benefit of the plaintiff's services to the full extent he had bargained for, excepting that he had got \$500 less in cash on the first payment than he desired, he is not bound to pay the plaintiff anything whatever, although he did, after the sale was made, promise repeatedly to pay him.

In our opinion that is not the law.

The general rule is, that a person should be paid for his work. It is also as plain a rule that a person must perform his contract to enable him to get his payment. But it has long been settled, that if a person do not literally perform his contract the person for whom the work was done, or the service performed, though he may reject the work, service, or article, is bound to pay for it, if he accept of it, to the extent to which it is of any value to him, or to the amount of the perfect work or article less the sum that may be required to complete it. The acceptance gives rise to a new contract, which is implied by law, and it is not a question for the jury : *Prickett v. Badger*, 1 C. B. N. S. 296.

The case of *Antrobus v. Wickens*, 4 F. & F. 219, is not applicable here, as that merely shews what acts the agent must do in effecting a sale or bringing about a bargain, and what acts are to be considered as his acts, to entitle him to the commission.

The case of *Green v. Bartlett*, 14 C. B. N. S. 581, shews that a mere statement by the agent, to one who enquired of him, that the defendant was owner of the property, by means of which information the principal parties were brought together and dealt with each other, was such an act as entitled the agent to his full commission.

Here the learned Judge has found as a fact, and the evidence shews, that the sale was effected through the plaintiff's means.

The case of *Toppin v. Healey*, 11 W. R. 466, was then relied on for the defendant. In that case the plaintiff was employed by defendant to negotiate a loan for him, to be paid only in the event of his procuring the loan. Before the plaintiff had done anything the defendant varied the terms on which he would accept the loan. The plaintiff could have sued the defendant for breaking his contract in this respect, but he did not. He attempted to get the loan on the new terms, but failed. He got one offer on the old terms, which the defendant refused to accept. *Held*, that the plaintiff could not recover for his services under the new terms, because he was to be paid only if successful, and he was not successful; nor under the old terms, because the first contract was revoked, and defendant would not accept of the offer under such terms.

That can have no application to this case, because there the defendant, as he had the right to do under the revocation of the first agreement, refused to accept the offer which the plaintiff had obtained.

In this case, although the defendant might have objected to accept of the purchaser found by the plaintiff, who paid only \$500 down, he did not object to him, but accepted of him, and carried out the sale with him.

There can be no difference in principle between a contract

to find a purchaser of land on certain specified conditions, and to furnish a quantity of goods of a certain specified quality. In each case, as a rule, the contract must be performed to entitle the one who is to do the service, or to find the goods, to recover. But if, in either case, the contract has not been fully performed, but some service has been done, or some goods have been supplied, which the principal or the purchaser has, though not bound to accept, accepted, and which has or have been of some value to him, he is bound to pay something for that which he has accepted, under a new and implied contract in law, arising from the new state of things assented to on his part in lieu of the original contract. And more particularly should that be the case when the one who takes the benefit of the service promises repeatedly to pay for it.

There is everything in favour of such a rule, and it is every day acted upon, and it could not, in the nature of things, be dispensed with. Any other rule would lead to absurdity and intolerable injustice.

The remedy, too, is plainly on the common counts: *Prickett v. Badger*, 1 C. B. N. S. 296.

There are many of the reasons of appeal which I cannot quite understand. I have endeavoured to make out the meaning of some of them. Others of them are expressed so as to lead one to think there has not been a very clear perception of the fact or principle desired to be enunciated.

We do not say the plaintiff should have recovered \$200, but he should have recovered something; and as the defendant promised, after the purchaser was found for him, to pay the \$200, and as no objection was taken to the amount of damages in the rule below, we cannot entertain the objection now.

We have no doubt the learned Judge did what was substantially right between the parties.

The rule, excepting as to the alleged mis-trial, should therefore be sustained.

And as to that exception, the Statute 32 Vic., ch. 6, sec. 18, sub-sec. 3, provides "that it shall be competent for

the parties present at the trial to consent that the notice (for a trial by jury) shall be waived, and the case tried or damages assessed by the Judge, and to endorse a memorandum of such consent upon the record, and thereupon the said Judge shall proceed to the trial of the issues or assessment of the damages without the intervention of a jury: provided always, that it shall be competent for the Judge in his discretion to direct, that notwithstanding anything hereinbefore contained, any such action shall be tried or the damages assessed by a jury."

The parties present at the trial, by their counsel, did consent that the notice of trial by a jury should be waived, and the case tried by the Judge, and it was so tried; but they did not endorse a memorandum of such consent on the record, and the Judge did proceed to try the cause, and tried it without such memorandum having been endorsed. He did, however, note in his book the fact of such waiver by consent of parties.

It is now said, after such consent given, and a trial had, and a verdict rendered, that the whole of these proceedings are void, and must be vacated, because the memorandum of such consent was not endorsed upon the record at the time, and because the defendant's counsel had no power to waive a jury trial.

It is quite clear we shall not give relief on these facts, unless we are bound to do so.

In *Morgan v. Morgan*, Hardres 66, the Court arrested the judgment where an ejectment was tried in Monmouth instead of Herefordshire.

In *Ambrose v. Rees*, 11 East 370, on a motion to set aside the verdict for a mistrial, arising as to a trial in Monmouth, which it was contended should have been in Hereford, the Court refused to interfere on motion, as the defendant did not object at the trial, but left him to seek relief, if entitled to it, as the objection appeared on the record.

The same course was taken in *Regina v. Kennedy*, 26 U. C. R. 326.

In *Regina v. Sullivan et al.*, 8 A. & E. 831, on the trial

of a misdemeanor by a special jury, a jurymen after being sworn stated he was one of the grand jury who had found the bill. The counsel for the prosecution consented to withdraw the juror, and to try with the remaining eleven, but the defendants not consenting, the trial went on, and the defendants were convicted. On a motion for a new trial a rule was refused.

In *Doe dem. Ashburnham v. Michael*, 16 Q. B. 620, on the trial of a special jury case it was discovered, as the jury came into the Court to give their verdict, and before they had given it, that one of the jurors was a special jurymen summoned, not in this, but for another cause. The defendant objected to the jury. The plaintiff*insisted on the jury having been rightly empanelled. They gave a verdict for the plaintiff. *Held*, that the defect having been insisted on by defendant when discovered, before verdict, that it was still open to him: that there had been a mis-trial; and that there must be a *venire de novo*, not a new trial. See, also, *Ham v. Lasher*, 24 U. C. R. 533, note a.

In *Powell v. Sonnett*, 3 Bing. 381, the record stated a verdict for the plaintiff on twelve counts, and that the jury were discharged on eight others. The issues on the latter counts being immaterial, the Court refused on error to reverse the judgment, on the ground that the discharge of the jury was not stated to have been with the consent of parties.

Where the record does not shew it was done without consent, the discharge must be taken to be regular, and cannot be a cause of error: *Scott v. Bennett*, L. R. 5 H. L. 234.

The case of *Lynch v. Coel*, 13 W. R. 846, shews that a counsel has power at the trial to agree to a nonsuit, although his client objects to his so doing. And the case of *Strauss v. Francis*, L. R. 1 Q. B. 379, shews that a counsel may consent to withdraw a juror, and it is binding on the client, though he dissented, if that dissent were not brought to the knowledge of the opposite party.

We have no doubt the counsel of both parties, having the general conduct of their respective sides of the cause for their clients, had the power to waive the jury notice, and to assent to a trial by the Judge without a jury.

The consent was expressly and voluntarily given. Nothing was assumed or dictated by the Judge. No writing was necessary to express that consent. All that it is necessary to do is to "endorse a memorandum of such consent upon the record"—that is, to keep in remembrance the fact that such a consent was given; and *thereupon* the Judge shall try the cause without the intervention of a jury.

We have no doubt that memorandum can be made *nunc pro tunc*. The amendment can be made from the Judge's notes. Much more important matters can be amended than that. It is every-day's practice to amend the *postea* by the Judge's notes, and it would be extraordinary if so formal a memorandum could not be made.

We should all regret if the trial, and the expense attendant upon it, could be rendered abortive by so technical and mischievous an objection. If any weight could be given to it, we should not facilitate the attempt to subvert all that had been done trusting to the good faith of the defendant and his attorney, by listening to the objection on motion, or by way of appeal from that motion. The party would have to seek redress by writ of error if he wished to venture on further litigation and a further expenditure to no purpose.

The Court of Exchequer Chamber in *Powell v. Sonnett*, 3 Bing. 381, offered the plaintiff the right to amend, by stating that the discharge of the jury from finding on certain issues was founded on the consent of parties, but the plaintiff, believing he could sustain his record without the expense of an amendment, declined to take it.

If an amendment in such a stage of the proceedings were offered to the party to state a *consent* of that nature upon the record, we think we need have no hesitation in saying that *nunc pro tunc* a memorandum of a consent given and acted on in fact may be noted on the back of the record.

On all grounds the appeal fails, and it must be discharged with costs.

Appeal dismissed (a).

(a) See Beckett et al. v. Cockburn, *post* p. 610.

CANADIAN BANK OF COMMERCE V. McMILLAN.

New trial—Weight of evidence—Evidence of parties.

Where in an action against the maker of a promissory note, the plaintiff produced several witnesses who swore to the defendant's signature, which two of them said he had admitted, but the jury found for defendant on his own evidence alone—the Court granted a new trial, with costs to abide the event.

Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties were admissible as witnesses.

ACTION on a promissory note for \$1600, made by defendant, payable to one McDonald, and endorsed to the plaintiff, and on the common counts.

Pleas—1. *Non fecit.*

2. *Nunquam indebitatus.*

The cause was tried before the County Court Judge of Middlesex, sitting for Gwynne J., at the last London assizes.

At the trial the signature of the defendant was disputed, and for the plaintiff the manager of the plaintiffs' bank at London was called, who swore that he had other notes of defendant which he had retired: that he had a recollection of these signatures: that he had seen defendant write, and that, from seeing him write, and his knowledge of the defendant's writing, the note in question bore defendant's signature: that the payee, McDonald, left London (absconded): that afterwards the defendant asked to see this note, and on its being produced witness asked defendant if it was his signature, and defendant said yes. On cross-examination, he said that he saw defendant sign his name repeatedly: that he shewed this note to defendant at the time, and thought defendant had it in his hands: that defendant was in the bank four or five times to see the witness about the note: that defendant never denied it to be his signature positively, but did not admit it after the first time: that he said he did not owe McDonald all that money, that the payee had taken him in; and the witness said he was sure he never denied it to be his signature. On re-examination, he said when defendant came to the bank he asked to see

this particular note, and that he shewed it to him, and he admitted his signature, and also the signature of his father, who was the other maker.

The ledger keeper of the bank was called, and said he knew defendant: that after McDonald left the bank took the precaution of notifying persons whose names were to notes they held from McDonald: that after such notices were sent defendant came to the bank, and the manager asked witness for this note, which he gave him, and that it was shewn to defendant: that defendant admitted his signature to it, and that of his father also; and the witness was certain that this identical note was produced to the defendant, who admitted his signature to it. On cross-examination he said that he did not remember defendant saying he did not sign it, or that there was any conversation about any other note whatever.

A witness, Duncan McMillan, who knew defendant, and had seen him sign his name perhaps half-a-dozen times, testified to the note being signed by defendant.

The manager of Molson's Bank was called, who knew defendant, and had seen him write his signature to a note in the bank, and who was acquainted with defendant's handwriting when the witness was in business as a broker. He had no doubt of the signature to this note being the defendant's. He had had drafts of the defendant, and from seeing him write his name, and from his knowledge of his writing, could swear that the signature to the note was his.

Another witness, a broker, and dealer in notes, and accustomed to signatures, said he considered himself competent to speak as to the genuineness of signatures. Upon looking at a mortgage signed by defendant, and the signature to this note, he said that the signatures were written by the same person.

For the defence the only witness called was the defendant, who swore that he never gave this note: that he never signed it, and that it was a forgery: that he never got \$1500 or 1600 from the payee, McDonald. He admitted

having got a notice from the bank about this \$1600 note, and that he went to the bank, but said that he told the manager he could not have such a note : that the manager held up the note ; that he, defendant, said it was his name, but that he never put it there. On cross-examination he said, that he always denied this note : that he did not ask to see this particular note, but to see all the notes in the bank : that he was in the habit of getting money from McDonald to buy cattle, and that \$400 was the most he ever got : that when McDonald went away he held his notes to about \$600. Defendant was asked to look at three slips containing defendant's signatures cut off notes. He could not say whether he wrote them or not. Defendant also denied that the other signature as maker was his father's. The father had died last January.

In reply, the plaintiffs' manager was recalled, who testified that the signatures on the three slips produced to defendant were the signatures of defendant, cut off notes which defendant paid and allowed the witness to retain.

Two other signatures of defendant were proved, one to an order witnessed by defendant's counsel.

The learned Judge left the case to the jury, reviewing the evidence, and calling the attention of the jury to the fact that the defendant's denial of his signature rested on his own testimony.

The jury found for the defendant.

Becher, Q.C., obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence, and the weight of evidence.

Harrison, Q.C., shewed cause, citing *Commercial Bank v. Denison*, 1 U. C. R. 13 ; *Doe Magher v. Chisholm*, Dra. Rep. 227 ; *Carstairs v. Stein*, 4 M. & S. 192.

Becher, Q.C., supported the rule.

MORRISON, J., delivered the judgment of the Court.

The evidence given at the trial on the part of the plaintiffs is very strong indeed, while that on the part of the

defence rests solely on the testimony of the defendant; and without expressing any opinion on the merits of the case, we think that it would be more satisfactory that the case should be submitted to a second jury. Before the alteration in the law of evidence allowing parties to give testimony on their own behalf, new trials upon the ground of the verdict being against the weight of evidence were rarely granted: see the observations in *Mellin v. Taylor*, 3 Bing. N. C. 109; but since the change in the law, the Courts have been inclined to modify that rule when the verdict moved against was obtained on the evidence of a plaintiff or defendant. We refer to *Saunders v. Davies*, 16 Jur. 481; *Skiffington v. Clark*, 17 Jur. 466; and also to *Davies v. Roper*, 2 Jur. N. S. 167; and the notes appended to these cases.

The rule will be absolute for a new trial, costs to abide the event.

Rule absolute.

FAIR ET AL. V. MCCROW.

County Court—Jurisdiction—Title to land in question—Will—Estate.

Declaration: that one A. devised the north half of lot 15 to his son, W., in fee, and the south half to his wife, J., for life, and after her death to W. in fee: that during W.'s life he and his mother, J., leased to defendant the whole lot for five years, at an annual rent; and that W. died soon after, having devised his land to the plaintiffs in fee. And the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J after notice.

The defendant pleaded on equitable grounds that W., by his will, devised all his lands to the plaintiffs in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent.

Held, that upon these pleadings the title to land was brought in question, and the jurisdiction of the County Court ousted.

Held, also, that by the devise, as stated in the plea, the legal estate in the land was vested in J. under the Statute of Uses.

APPEAL from the County Court of Oxford.

The declaration alleged that one Adam Allison, being the owner in fee simple of lot 15, and the south west quarter of 14, in the fourth concession of Blenheim, devised the north

half of 15 and the S. W. quarter of 14 to his son William in fee, and the S. half of 15 to his wife Jane, for life, and after her death to William in fee: that the testator died on the 3d February, 1864: that William afterwards died on the 13th December, 1868, having devised the N. half of 15 and the S. W. quarter of 14 to the plaintiffs in fee: that on the 14th October, 1868, the said William and Jane Allison leased to defendant lot 15 and the S. W. quarter of 14, with certain exceptions specified, for five years from the 1st of April, 1869, at \$300 a year, payable on the 1st February in each year. And the plaintiffs averred that on the 1st February, 1871, \$300 rent fell due: that although the plaintiffs, before it fell due, and before defendant paid it, notified defendant that they were entitled to a portion of such rent, to wit \$200, and not to pay it to Jane Allison, but to them, yet defendant paid the whole \$300 to her, whereby the plaintiffs became entitled to demand said \$200 from defendant.

Defendant pleaded, on equitable grounds, that defendant entered into the premises leased in William Allison's life time, and that said W. A., by his will devised all his real estate to the plaintiffs in trust for the sole benefit of his mother, the said Jane Allison, during the term of her natural life, under which devise she claimed and claims to be entitled to demand and receive from defendant the said rent reserved by the lease; and that she demanded and received from defendant the said rent, which was paid to her in good faith by defendant, believing her to be the person entitled to receive it under the terms of said lease and devise.

The plaintiffs demurred to the plea, and the defendant joined in demurrer and took exceptions to the declaration.

The learned Judge decided that the validity of the bequest to Jane Allison was not brought in question, but was admitted by the pleadings, and therefore that no question of jurisdiction was involved; and he gave judgment for defendant upon the exceptions to the declaration.

The plaintiffs thereupon appealed.

Read Q. C. for the appellants.

VanNorman contra.

The argument upon the sufficiency of the declaration is omitted, as the judgment does not proceed upon that point.

MORRISON, J., delivered the judgment of the Court.

It appears that in the Court below the question of jurisdiction was raised, as being a case in which the title to lands came in question, but the learned Judge was of opinion that the validity of the devise to the plaintiffs was not disputed, and that the jurisdiction of the Court was not involved.

We are, however, of opinion that upon these pleadings the title to the lands necessarily comes in question.

Looking at the declaration alone, its goodness is open to considerable doubt, for, without reference to the plea, the plaintiffs would appear to take under the will of the deceased lessor as tenants in common as to part of the lands out of which the rent was payable by the defendant, and it is very questionable that they can join in an action like this to recover jointly their individual shares or apportionment of the rent.

But when we come to look at the plea, then it appears that these plaintiffs take as trustees only, and consequently as joint tenants; but the plea also shews that the testator by the will devised the lands to the plaintiffs in trust for the sole benefit of Jane Allison, (one of the lessors) during the term of her natural life, and that Jane Allison under and by virtue of the devise claimed to be entitled, and demanded and received the rent in question from the defendant, and that the same was paid to her under these circumstances. Now we think that under this devise she was entitled to receive the rent in question, because we are of opinion that the lands are vested in Jane Allison during her life by operation of the Statute of Uses.

In *Barker v. Greenwood*, 4 M. & W. 429, Baron Parke says: "Where the words are, 'in trust to permit and suffer A. B. to take the rents and profits' there the use is

divested out of the trustees and executed in the party, the purposes of the trust not requiring that the legal estate should remain in them. That is clearly the settled law, and has so long been so, that it is not now open to enquire whether it was rightly established or not."

And in *Williams v. Waters*, 14 M. & W. 166, the words of the devise were: "In trust for the said Ann and her assigns for her life, for her own sole and separate use, independent of the said H. W., her intended husband, his debts, control, or enjoyment." It was contended that it was a special trust, not a use executed in her, inasmuch as it involved an object that could not be carried into effect without the trustees having the legal fee: viz, the payment of the rents and profits to her sole and separate use during coverture; but the Court held the case was within the very words of the Statute of Uses.

The words of the devise as set out in this plea are free from any difficulty, being "in trust for the sole benefit of Jane Allison during the term of her natural life,"; and upon the authority of these cases the legal estate is vested in her by operation of the Statute.

Upon these pleadings the title to the lands does come in question, and therefore the Court below was ousted of jurisdiction. The result is that we cannot give any judgment, except to say that, as the want of jurisdiction appears on the pleadings, the case stops.

IN THE MATTER OF PARTITION BETWEEN SHAVER ET AL. AND
HART ET AL.

Conveyance to husband and wife—Effect of—C. S. U. C. ch. 82, sec. 10—Partition Act, 32 Vic. ch. 33, O.—Right of appeal.

The effect of Consol. Stat. U. C. ch. 82, sec. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy.

Held, therefore, that a conveyance of land to a husband and wife in fee did not make them tenants in common; but that they held, as before the statute, by entireties, and that on the husband's death the wife took the whole estate.

An appeal will lie under the Partition Act, 32 Vic. ch. 33, O., from the judgment of a County Court Judge on a special case stated.

THIS was an appeal from an order of the Judge of the County Court of Middlesex, in a case of partition under the 32 Vic. ch. 33, O., upon a special case stated in the Court below.

The question was, whether under a conveyance made on the 23rd May, 1836, of the lands in question to Simeon Hart and Anna his wife, habendum to the said Hart and his wife, their heirs and assigns for ever, Hart and his wife, under the 10th section of ch. 82, Consol Stat. U. C., (4 W. IV., ch. 1, sec. 48,) took the land as tenants in common. The learned Judge in the Court below was of opinion that they so took the land, and ordered partition, awarding to the eldest son of Simeon Hart, (who died intestate in 1849,) as heir-at-law, one moiety of the lands, and dividing the other moiety between that son and his brother and sisters according to the will of their mother, Anna Hart (who had survived her husband), by which all her real estate was bequeathed to her sons John and Ashly, and to her three daughters, in certain specified shares.

From this judgment the appellants, the three daughters and their husbands, appealed, alleging as reasons:

1. That Simeon Hart and Anna Hart his wife, under the said deed, became tenants by entireties, and not joint tenants or tenants in common, of the said land, and that upon the death of the said Simeon Hart, the said Anna Hart became solely seized thereof in fee simple.

2. That section 10 of Consol. Stat. U. C. ch. 82, upon which the learned Judge bases his judgment, does not apply to the said deed, or to any conveyance except such as, but for it, would create a joint tenancy, and does not apply to a deed to man and wife.

3. That said deed could not at common law create a joint tenancy, and the said section is therefore inoperative upon it.

Becher, Q. C., for the appellants. It will be objected that there is no right of appeal, but sec. 37 of the Partition Act, 32 Vic., ch. 33, clearly gives it. The enactment is "that upon any final judgment, decree, or order, an appeal may be had by any of the parties interested, in the same manner, and with the same consequences, as in other cases of appeal from the decision of any Court rendering such judgment, decree, or order." This special case is stated under secs. 17 and 18.

Then as to the main question. The Statute, Consol. Stat. U. C., ch. 82, sec. 10, enacts that whenever by any assurance executed after 1st July, 1834, land shall be granted "to two or more persons other than executors or trustees in fee simple, or for any less estate," it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such assurance that they shall take as joint tenants. The object of this plainly was to substitute a tenancy in common for a joint tenancy where the latter, but for the statute, would have been created. It was never intended to affect such a case as the present, where the tenancy created is neither a joint tenancy nor a tenancy in common, but a tenancy by entireties, arising out of and consistent with the peculiar relationship of husband and wife, and the legal incidents of such relation. The wife therefore took the whole estate on her husband's death, and the whole, not a moiety, passed under her will: The Married Women's Act, Consol. Stat. U. C. ch. 73, does not affect the question. He cited *Pollok*

v. *Kelly*, 6 Ir. C. L. R. 367, 372, 373; *Leith's* Blackstone, 122, 125; *Leith's* R. P. Stats. 86, 164, Consol. Stat. U. C. ch. 82, sec. 38; *Washburn* on Real Prop. Vol. I. p. 276, 278, 421; *Williams* on R. P. 185; 1 Preston Conv. 55; *Watkins* on Conveyg, 9th Ed. 170, 177, 178; *Doe d. Wilson*, 4 B. & Al. 311; notes to *Morley v. Bird*, Tud. L. C. 801.

Harrison, Q. C., contra. There is no right of appeal. The effect of sec. 37 is to give such right only where in other cases an appeal would lie from the County Court. Sec. 67 of the County Courts Act, Consol Stat. U. C. ch. 15, gives no appeal from a judgment on a special case: *Harding v. Knowlson*, 17 U. C. R. 564; and 27 Vic. ch. 14, sec. 2, amending that clause, extends the right of appeal to a judgment upon points reserved, but says nothing about a special case.

Then as to the ground of appeal. Originally husband and wife were considered as one person: *Co. Lit.* 112 a, 187 b.; *Attorney General v. Bacchus*, 9 Price 30, 11 Price 547; *Doe Dormer v. Wilson*, 4 B. & Al. 303, 311; *Paine v. Wagner*, 12 Sim. 184; *Warrington v. Warrington*, 2 Hare 54, 56; *Lewin v. Cox*, Serjt. Moore, 558. Consol. Stat. U. C. ch. 73, now provides for married women holding their real estate separately, and makes them for this purpose separate persons, thus wholly changing the Common Law. This must be read in connection with ch. 82. There is no reason therefore why the words "two or more persons" should not be held to include a case of husband and wife. They do so in their natural meaning, and such an interpretation is now not inconsistent with any known principle of law.

MORRISON, J., delivered the judgment of the Court.

It is quite clear that at the time of the passing of the act 4 Wm. IV. under such a conveyance to husband and wife they had neither a joint estate nor an estate in common, but their interest was described as a tenancy by entireties.

As said by Blackstone, J., in *Green dem. Crew v. King*, 2 W. Bl. 1213, "This estate differs from joint tenancy,

because joint tenants take by moieties, and are each seized of an undivided moiety of the whole, *per my et per tout*, which draws after it the incident of survivorship, or *jus accrescendi*, unless either party choses in his life-time to sever the jointure. But husband and wife being considered in law as one person, they cannot, during the coverture, take separate estates; and therefore, upon a purchase made by them both, they cannot be seized by moieties, but both and each has the entirety. They are seized *per tout*, and not *per my*. The husband, therefore, cannot alien or devise that estate, the whole of which belongs to his wife, as well as himself." And De Grey, C. J., in the same case says, "The same words of conveyance which would make two other persons joint tenants, will make husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor." And see the judgment of Lord Kenyon to the same effect in *Doe dem. Freestone v. Parratt*, 5 T. R. 652, and in *Cru. Dig. by Greenleaf*, 2nd Vol., Title 18, Joint Tenancy, sec. 45; "As there can be no moieties between husband and wife, they cannot be joint tenants. Therefore when an estate is conveyed to a man and his wife and their heirs, it is not a joint tenancy."

In the case of a tenancy by entireties the survivor does not take as a new acquisition, but under the original limitation, his or her estate being simply freed from participation by the other.

Such being clearly the state of the law at the time of the passing of the 4 Wm. IV., ch. 1, did the 48th section of that statute in any way affect the rights or interests of husband and wife under a conveyance of lands to them during coverture? In our judgment it did not. It appears to us manifest from the language of the section as a whole, that its sole object and effect was, and is, to change the rule of the common law so that assurances, &c., which before the 4 Wm. IV. created a joint tenancy, should when executed after the 1st July, 1834, create a tenancy in common, unless a contrary intention appeared on the face of

the deed, &c., that the grantees should take as joint tenants. It never was contemplated that it should affect a conveyance which before July, 1834, could not create a joint tenancy; the language of the section in question being, that where land shall be granted, &c., to two or more persons, &c., "it shall be considered that such persons took or take as tenants in common, and not as joint tenants"—that is, as they would before the statute; clearly shewing that the only conveyances in the mind of the Legislature were those which without the Act would have passed the lands in joint tenancy, and, as already shewn, a conveyance to husband and wife would not do so. And even where the conveyance to husband and wife expressly declared that it should so pass, the deed would not so operate. In *Pollok v. Kelly*, 6 Ir. C. L. Rep. 372, where the conveyance was to husband and wife as joint tenants, the Chief Justice in giving judgment says: "We are of opinion that the operation of the conveyance was to grant to Mr. and Mrs. Pollok an estate by entireties; for to speak of a grant to a husband and wife as an estate of joint tenancy is, properly speaking, a solecism."

Again, as shewing the view taken by the American Courts. Mr. Kent in his Commentaries, 11th ed., vol. iv., p. 361, in referring to the laws of the States of the Union, says: "In New York, as early as 1786, estates in joint tenancy were abolished, except in executors, and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. The New York revised statutes have re-enacted the provision." And he enumerates some nine States where joint tenancy is placed under the same restrictions as in New York, and cannot be created but by express words. He then states, "The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the

survivor takes the whole; and during their joint lives neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate so held by husband and wife affected by the Statutes of Partition."

During the argument the learned Chief Justice of Appeal referred to some remarks of Lord St. Leonards in his treatise on the new Statutes relating to real property, at page 268, 2nd ed., upon the absurdity of a literal construction of the 2nd section of the Imperial Stat. 4 Wm. IV., settling the law of descent, and which has some bearing on the subject we are now considering. A case of a Bill for Partition, *Cooper v. France*, 14 Jur. 214, was before Shadwell, V. C., and by a literal construction of the second section, D., although his mother's heir, would lose half of his inheritance on her death; whilst on his aunt's death, although his aunt left a son and heir, D would gain more than he had previously lost. The Vice Chancellor said the question was, whether the act applied to a case which was perfectly plain before the statute, as, for instance, to the case of a descent on an eldest son; and in giving judgment said: "he did not see how any one acquainted with the principles of law could doubt. Could you suppose that an Act of Parliament, by any portion of it meant to introduce doubt into a case that was so plain before the act passed?" The Vice Chancellor decided that the case was left to the old law, and that the son should inherit the entire share of his mother; and, as remarked by Lord St. Leonards, "in thus deciding he did no violence to the words of the statute, but by a judicious construction of them prevented them from creating a mischief where none before existed; it would have been no amendment of the law of inheritance to take from a son two-thirds of his mother's estate; in order to vest them in his aunts." So here, by a literal construction of the 10th section of our Act: viz, by holding that by the words "two or more persons," it was intended to apply them in reference to a conveyance made to husband and wife

during coverture, it would be no amendment of the law to abolish a tenancy, when husband and wife are the only persons that can be tenants by entireties, a tenancy well understood, and create as between them a new tenancy which would obviously create a confusion of interest, one quite inconsistent with the marital state, and the principles of the Common Law.

Mr. Dwaris, in his work on Statutes, p 564, says: "As a rule of exposition, statutes are to be construed in reference to the principles of the Common Law. For it is not to be presumed that the Legislature intended to make any innovation upon the Common Law, further than the case absolutely required. The law rather infers that the Act did *not* intend to make any alteration *other* than what is specified, and besides what has been plainly pronounced; for if the Parliament had had that design, it is naturally said, they would have expressed it."

During the argument it was suggested that an appeal did not lie in a special case like this; but on reference to the statute of Ontario respecting Partition, 32 Vic. ch. 33, by the 17th and 18th sections, provision is made for the stating of a special case, making it up and proceeding to judgment, &c.; and by the 37th section it is provided that upon any final decree, or order, or judgment, an appeal may be had by any of the parties interested, &c.

On the whole, we are of opinion that this appeal should be allowed, and that the order of the Court below should be so varied, that the shares of the respective parties should be as directed in the will of the testatrix: that is to say, the sons John and Ashly, and the daughters Rebecca and Mary Ann, one-sixth part each of the lands in question, and the daughter Jane one-third part of the same.

Appeal allowed (a).

(a) The appeal was allowed *with costs*. See *ante*, p. 576, note a.

BECKETT ET AL. v. COCKBURN.

Contract to perform work—Failure to complete by time specified—Acceptance.

Declaration, that the plaintiffs agreed to construct an engine for defendant, and to put the same into a certain steamer ready for service by the 1st of April, 1871, the plaintiffs to pay \$100 a day if not completed by the 15th; and the defendant agreed to pay therefor certain sums in cash, and to give endorsed notes for other sums, the last note to be payable on the 1st July, 1872. And the plaintiffs averred that they did not complete the work by the 1st of April, nor until a short time after the time fixed by the agreement, but that they did complete it within such further period, and defendant accepted and has since enjoyed and used it, and with this exception all things were performed, &c; and although defendant paid the sums payable in money, yet he had not given the note to fall due on the 1st July, 1872.

Held, that the declaration was good, for that the acceptance enabled the plaintiffs to sue upon the agreement, and not upon the common counts only.

Semble, per *Wilson, J.*, that it would have been better to aver a dispensation or waiver of the time fixed.

DECLARATION: that on the 6th of October, 1870, by a agreement then made and entered into between the plaintiffs and the defendant, the plaintiffs agreed to construct and complete a Skeleton Beam Engine and Boiler, under the supervision and subject to the approval of Samuel Risley, and to erect and put the same in the steamboat "Nipissing," and have it so erected and ready for service on the 1st of April, 1871, with a stipulation that if the same were not so completed by the 15th of the said month of April, the plaintiffs should be liable to a penalty of \$100 a day; and the defendant, in consideration thereof, agreed to pay for such work as follows, the sum of \$970 in cash at the execution of the said agreement, the sum of \$970, on the 1st of January, 1871, and the respective sums of \$970 each, by three endorsed promissory notes of that amount, payable respectively on the first days of July and October, 1871, and the 1st day of July, 1872, with interest after the completion of the machinery. And the plaintiffs aver that they did not complete the said machinery by the said 1st day of April, nor until a short time after the time so fixed by the said agreement, but they did within such further period complete the same in accordance therewith, and the defen-

dant accepted, and hath ever since enjoyed and used the same; and save only as to the same being so completed within the time so originally agreed upon, all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action, and nothing happened to prevent the plaintiffs from maintaining the same; and although the defendant did pay and satisfy the said cash payment, and the payments respectively falling due on the first days of January, July, and October, 1871, yet he hath not given or granted an endorsed note for the payment to mature in July, 1872, according to the tenor, true intent, and meaning of the said agreement, or paid the amount so agreed to be paid on that day.

Demurrer, on the ground that it is shewn by the said count that the plaintiffs, on their part, have not fulfilled the contract declared on in this cause: that it was a condition precedent to the payment of the said sums of money, and the making and delivering said promissory notes, that the work should be complete by the 1st of April, 1871, and it does not appear that it was so completed by that date, nor is it alleged that the said work was finished by the said 15th of April, 1871, after which time \$100 a day was payable to the defendant, and it is not alleged that the same has been paid: that it is uncertain, as it does not appear when the said steam engine and boiler were ready and fit for service, nor is any excuse shewn, or reason given, for not completing the said work by the time specified in said agreement.

McMichael, for the demurrer. The action cannot be maintained on the special count, because the plaintiffs did not literally perform their contract. No doubt a person having done work such as this, which has been accepted by the employer, must be paid, but his remedy is on the common counts. The penalty for default does not excuse the default: *Roberts v. Brett*, 6 C. B. N. S. 611; *Parry v. The Great Ship Co.*, 4 B. & S. 556. The performance by plaintiffs was a condition precedent to their being paid:

Roberts v. Brett, 11 H. L. Cas. 337, 11 Jur. N. S. 377; *Inchbald v. Western Neilgherry Coffee, &c. Co.*, 17 C. B. N. S. 733. He also cited *Mussen v. Price*, 4 East 147; *Paul v. Dodd*, 2 C. B. 800; *Cutter v. Powell*, 2 Sim. L. C. 1.

McKelcan, contra. As the defendant has accepted the work he should pay for it, and if he have any cause of complaint against the plaintiffs he has his remedy by cross action. The plaintiffs are not obliged to sue on the common counts, and in this case they could not, for the 1st of July, 1872, when the promissory note which defendant should have given would have fallen due, has not yet arrived. The plaintiffs may sue on the special count, for the contract has been substantially performed; there has been a performance which the defendant has accepted and received the benefit of, and this has cured all objections to non-completion within the stipulated time; 1 *Wms. Saund.* 320, note (c); *White v. Beeton*, 7 H. & N. 50. He also referred to *Lucas v. Godwin*, 3 Bing. N. C. 737; *Carpenter v. Blandford* 8 B & C. 575; *Franklin v. Miller*, 4 A. & E. 599. [WILSON, J., referred to *Cort v. Ambergate, &c., R. W. Co.* 17 Q. B. 127.]

WILSON, J., delivered the judgment of the Court.

The question is, whether the plaintiffs can maintain the first count, when they shew they have not performed the special contract, not by reason of any fault on the part of the defendant, but by their own default, the defendant having accepted of the engine, and having kept and used it.

If the defendant had made the default, and had thereby prevented or discharged the plaintiffs from completing their contract, the plaintiffs having been all the time ready and willing to complete it, they could maintain an action on the contract, alleging those facts by way of excuse for their own non-performance. That was the case of *Cort v. The Ambergate &c., R W Co.*, 17 Q. B. 127.

The case of *Prickett v. Badger*, 1 C. B. N. S. 296, is somewhat the converse of the last case. There it was held that a principal who revoked his agent's authority was

liable as on a *quantum meruit* for such services as had been rendered, and that the agent was not compelled to sue specially for the wrongful revocation of the power. *Williams, J.*, said: "If the jury believe these facts to be established, then, according to *Planchè v. Colburn*, 8 Bing. 14, and other authorities in conformity therewith, the plaintiff was entitled to abandon the special contract, and resort to an action founded upon the promise which the law would infer from such a state of facts."

The case of the plaintiffs is, that in fact or in effect there has been a waiver as to the time. There may be such a waiver by parol, so long as it is not to operate upon or against a deed: *The Thames Iron Works, &c., Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358.

In *Carpenter v. Blandford*, 8 B. & C. 575, the time was held to have been waived, and the plaintiff to be entitled to recover his deposit back, as his appraiser had informed the defendant's appraiser he could not proceed with the valuation till the following day (a day too late by the agreement), and the other appraiser, as representing the defendant, had not dissented from it.

In *The Thames Haven Dock, &c., R. W. Co. v. Brymer*, 5 Ex. 696, in the Exchequer Chamber, there was an averment of the bankrupt in respect of whom the action was brought by Brymer, having been discharged from deducing a good title. As the agreement there was under seal, the discharge was required also to be under seal, and the Court on a general demurrer assumed that it was under seal. See also *Ripley v. McClure*, 4 Ex. 345.

In *Lucas v. Godwin*, 3 Bing. N. C. 737, the plaintiff contracted to build certain cottages by the 10th of October. They were not finished till the 15th. The defendant accepted the cottages. *Held*, that the plaintiff might recover the value of the work on the common counts.

In *Alexander v. Gardner*, 1 Bing. N. C. 671, a shipment to have been made in October was waived by defendant, and it was said by Tindal, C. J., "This being only a parol contract, if the party waived the condition he is in the

same situation as if it had never existed." It was argued in that case that it was not necessary to declare on the contract, even if it were conditional at first, the condition having been waived, and 1 *Wms. Saund.* 269 *b*, note, is referred to. Bosanquet, J., expressed himself also to that effect.

In *McIntosh v. The Midland R. W. Co.*, 14 M. & W., it is argued, at p. 556, that after an averment of performance in a count, a dispensation of some condition would be a departure if set up in the replication, and that the allegation should have been made in the first instance in the declaration.

In *Munro v. Butt*, 8 E. & B. 738, and note *α*, the special contract was declared on averring general performance, "except as to the completion of the aforesaid works within the time in that behalf aforesaid, which completion within such time the defendant dispensed with." Issue was joined on the alleged dispensation. Lord Campbell, C. J., said: "Admitting that in the case of an independent chattel, a piece of furniture, for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was made had yet accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or on an implied contract to buy it according to its value," &c.

White v. Beeton, 7 H. & N. 42, has also a bearing on the case.

Time here was, I think, the essence of the contract: *Wimshurst v. Deeley*, 2 C. B. 253.

The count perhaps would have been better if it had averred a dispensation or waiver of the time fixed, instead of stating the defendant's acceptance and retention of the engine as a due performance of the contract. The plaintiffs have apparently pleaded that which might be considered rather as evidence to sustain a fact, than a fact to be supported by evidence. Pleading a demand and refusal would

not constitute a conversion, although it would be evidence of it.

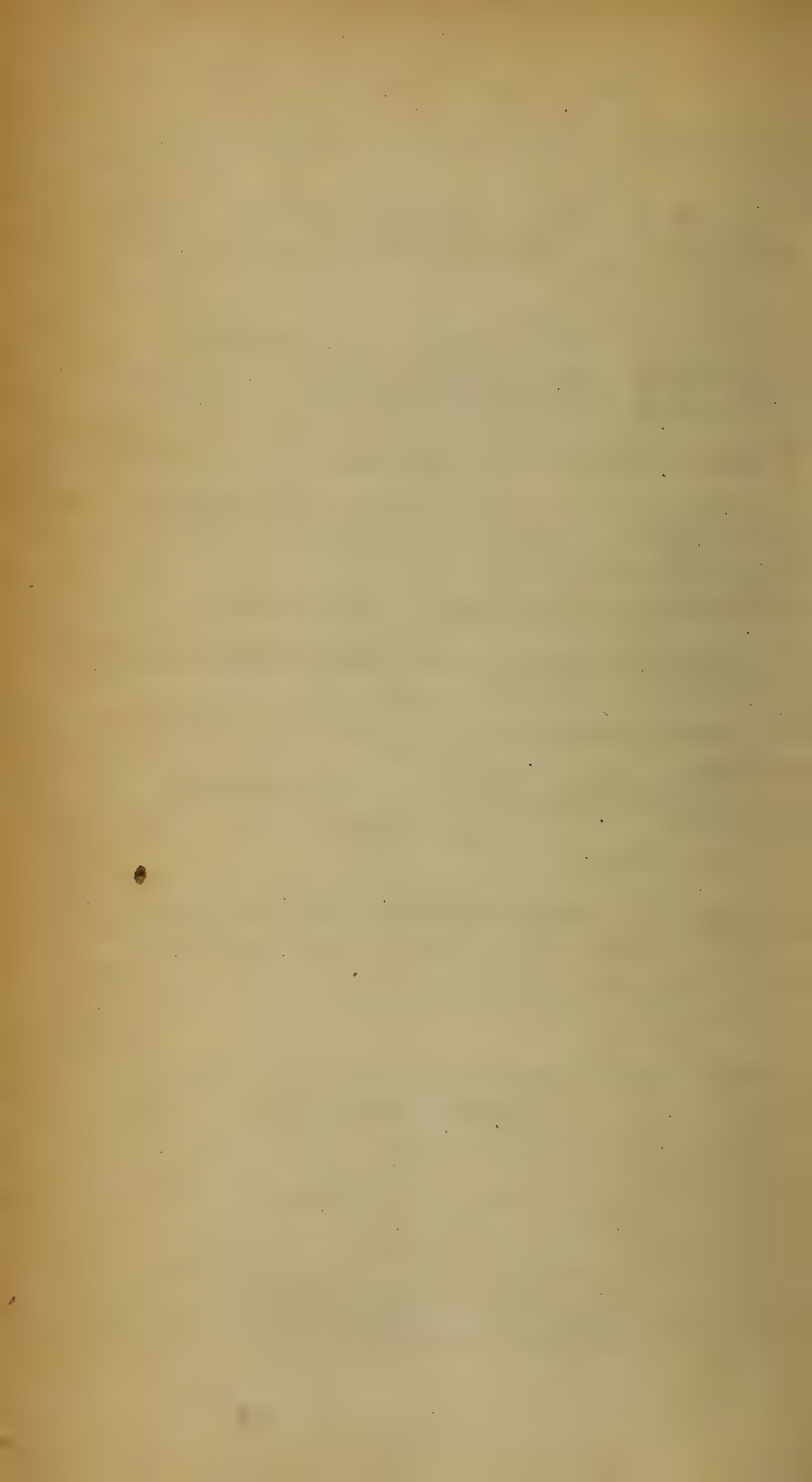
I do not say that the allegation of acceptance of the engine is *merely* evidence. It is a fact which of itself may be sufficient to establish a substantial performance, or which may be equivalent to an averment of dispensation or waiver as to time. I think it is so, and that it is an allegation the plaintiffs could make, as an act of substantial or accepted performance, and that it is not merely evidence of it.

The demand and refusal may not be a conversion, because the refusal may not have been wrongful, but the acceptance by the defendant can have only one meaning, and that is, that notwithstanding the time had gone by for the plaintiffs' performance of their contract, the defendant accepted the performance after the expiration of the time, and accepted it under the contract. It is that acceptance which gives continued vitality to the contract, and which enables the plaintiffs to sue upon it as subsisting and operating at that time.

There will therefore be judgment for the plaintiffs on the demurrer.

Judgment for plaintiffs. (a)

(a) See *Wycott v. Campbell*, ante p. 584.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM HILARY TERM, 34 VICTORIA, TO MICHAELMAS TERM, 35 VICTORIA.

ABANDONMENT OF RULE NISI.

Costs on.—See COSTS.

ACCEPTANCE.

Of work under contract, when not done by time specified—Effect of.—See CONTRACT.

See COMMISSION.

ACCORD AND SATISFACTION.

See LIMITATIONS, STATUTE OF, 3.

ACTION.

Horse let to another—Injury to—Right of owner to sue.—The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall. *Held*, that the plaintiff might maintain an action therefor.—*Walker v. Sharpe*, 340.

See MONEY LENT.

AGENT.

False representation of authority to contract.—See FALSE REPRESENTATION.

See PRINCIPAL AND AGENT.

ALIENAGE.

Ejectment—Alienage—Evidence of having taken oath of allegiance—Presumption—Proof of petition to Executive Council in 1797.—In ejectment both parties claimed through one James Smith. The defendants claimed under Jonathan, his elder brother; the plaintiffs claimed through John, his younger brother, contending that Jonathan, being an alien, could not inherit.

James, Jonathan, and John, were all born in the Province of New York, before the Treaty of Independence in 1783, James about 1770, and Jonathan two years after, their father being a British subject. James and Jonathan came to Canada in 1792, and John in 1794. A copy of a petition to the Administrator of the Government of Upper Canada was produced, certified by the Clerk

of the Executive Council, purporting to be signed by the three, one being a marksman, stating that they had come into the Province about four years before, and "had taken the usual oaths prescribed," and praying for a location of 200 acres each. The endorsements shewed that it was received on the 15th of May, 1797, and a grant recommended on the following day.

James Smith remained in the Province until his death, in 1843, having lived on the land in question since 1804. Jonathan, in 1801, received a grant of land in this Province, which among other things provided that any one coming into possession of the land should within twelve months take the oath of allegiance; but in 1804 he went to live in the State of New York, where he continued till his death, in 1846. John remained in the Province, and died here in 1842.

Held, 1. That the petition was admissible as evidence, without any proof of the signatures.

2. The Court being empowered to draw inferences as a jury, that it might properly be inferred that the three brothers had taken the oath of allegiance before some one properly authorized.

3. That as to James, his remaining in the United States so long after 1783 would shew his determination to become an American citizen, in which case, without reference to our Statutes, he, as an alien, could not transmit the estate either to John, through whom the plaintiffs claimed, or to Jonathan; but that under 9 Geo. IV., ch 21, having taken the oath of allegiance, his disability was removed.

4. That as to Jonathan, in the absence of anything shewing a previous intention to become an

American citizen, his coming to this country, taking up land, and taking this oath, shewed a clear election on his part to become a British subject, and his return to the United States could not make him the less one.

It was *held*, therefore, that the plaintiffs' case failed, Jonathan being entitled to inherit.—*Montgomery et al. v. Graham et al*, 57.

AMENDMENT.

See PRACTICE—TRIAL.

APPEAL.

1. Appeals will not in future be heard unless the grounds of appeal are entered on the appeal books when delivered.—*Eddy v. The Ottawa City Passenger R. W. Co.*, 569.

2. The appeal from a County Court in this case was allowed *with costs*. See p. 576, note *a*.

3. An appeal will lie under the Partition Act, 32 Vic. ch. 32, O, from the judgment of a County Court Judge on a special case stated.—*In re Partition between Shaver et al and Hart et al*, 603.

From Judge's order.]—See INFANTS.

From Sessions—Power to give costs.]—See SESSIONS.

ARBITRATION.

Action on award—Excess of authority—Matters considered not within the submission.]—By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant on or before the 20th March then next, for which the

defendants covenanted to pay so much per log. It was provided in the last clause that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks.

By a submission under seal, reciting this agreement and that differences existed in respect thereof and of the advances made thereon by defendant to plaintiffs, all such differences were referred to arbitration. The arbitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, \$866.

To an action on this award, defendant pleaded no award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that owing to the snow the plaintiffs could not proceed with the work, and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the cost of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference.

Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiffs for work done under the verbal agreement, which was not within the submission: that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action.—*Tully et al. v. Chamberlain*, 299.

ASSAULT.

Information for — Amendment — Second information for same offence—Right to have the first disposed of—Mandamus.—The applicant, C., having appeared to an information charging him with an assault, and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words “falsely imprison.” This being refused, H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information, “Case withdrawn by permission of the Court, with the view of having a new information laid.”

Held, that the complainant could not, even with the magistrate’s consent, withdraw the charge, the defendant being entitled to have it disposed of.

Held, also, that an information may be amended, but if on oath, it must be resworn; and that the amendment might have been made here.

Semble, that the more correct course would have been to go on with the original case, and, under 32–33 Vic. ch. 20, sec. 46, to refrain from adjudicating.

A *mandamus* to hear and determine the first charge, and, if dismissed, to grant a certificate of dismissal, was however refused, for the withdrawal was equivalent to a dismissal; and the magistrate might, under sec. 46, refrain from adjudicating, and if it were dismissed without a hearing on the merits there would be no certificate.—*In re Conklin*, 160.

ASSESSMENT.

See TAXES.

ATTACHMENT.

A writ of attachment for contempt in not obeying a Judge's order, made under C. S. U. C. ch. 74, for the delivery of children under 12 to the mother, was by order of the Judge issued from the Court of Q. B.; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it he could not be heard; but *Held*, that he might nevertheless *defend himself* by objections to the process, if irregular.

Held, also, that it was unnecessary to make the order for delivery of the children a rule of Court before bringing the father into contempt, but that the proceedings should have been moved into and adopted by the Court before an attachment could issue from it; and that this attachment therefore was irregular.

Per Wilson, J.—The Judge could by his own order have attached the party.

Held, also, that such attachment was properly signed and sealed by the Clerk of the Process, and issued by the Clerk of the Crown.—*In re Allen et al*, 458.

ATTORNEY.

Hope v. Caldwell, 21 C. P. 241, followed, holding that a promissory note taken from a client by an attorney or counsel for costs to accrue in respect of services to be rendered to the client, is invalid.

Per Wilson, J.—The plea was

bad for not alleging that the note, under the facts stated, was void by the law of Quebec, by which the validity of the note must be decided.—*Robertson v. Caldwell*, 402.

AWARD.

See ARBITRATION.

BAILMENT.

See ACTION.

BANKRUPTCY.

Action on note—Plea, discharge under foreign bankrupt law—Omission of plaintiff's debt from schedule.]
—To an action on a promissory note made in the United States, defendant pleaded his discharge under the bankrupt laws there; to which the plaintiff replied, that by such law the discharge was fraudulent and void, because the defendant in the schedule attached to his petition, had fraudulently, and with intent to prevent the plaintiff from sharing in his estate or opposing his discharge, omitted any mention of the plaintiff or his claim.

The omission was proved, and the law of the United States was stated to be, that such omission, unless fraudulent and wilful, would not avoid the discharge; but it was not shewn whether the assent of a certain number of creditors or the payment of a certain dividend was requisite, or whether there was any provision which would shew a motive for the omission. The defendant swore that his reason for the omission was, because he thought the claim was paid: that in 1865 he had left property with one C. to sell and pay it, among other debts, and told defendant's brother, who then

held the note, that he had done so; and that as late as 1868 he had seen him, and he never mentioned the subject, nor had he, defendant, at any time been asked for the money. The brother, in answer, said he had asked for payment, but did not state the time.

Held, leave having been reserved to move for a nonsuit upon the whole case, that the rule should be absolute; for though upon the plaintiff's evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by defendant.—*Foster v. Taylor*, 24.

BANKS.

See SALE OF GOODS.

BARRISTERS CALLED.

See pp. 243, 522.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See ATTORNEY.—BANKRUPTCY.
NEW TRIAL.

BILLS OF LADING AND WAREHOUSE RECEIPTS.

See SALE OF GOODS.

BOUGHT AND SOLD NOTES.

Variance.—In an action upon a contract for the sale and purchase of wheat by bought and sold notes, it appeared that the sold note made the wheat deliverable at Montreal afloat, "on arrival during the first half of August next," vessel to be named (meaning by the seller); while the bought note made it de-

liverable "during first half of August next, at seller's option." *Held*, a material variance, which avoided the contract.

The seller having named one vessel, *Semble*, that he could not, upon the facts stated in this case, alter it and substitute another, though under certain circumstances this might be done.—*Butters v. Glass*, 379.

CARRIERS.

Contract to forward goods—Deviation from specified mode of conveyance—Loss by fire—Remoteness of damage.—The plaintiffs, living at Southampton, directed goods purchased by them in Montreal to be forwarded to Kingston, to the care of the schooner "Regina." The captain of the "Regina," being unable to wait for their arrival at Kingston, directed defendants, who were forwarders there, to send them on to Hamilton by the mail steamer and thence by rail to Sarnia, where he would take them up. Defendants, however, shipped them by a propeller, which was burned with them on board in the river St. Clair. They had been insured to go by the "Regina," and the policy was cancelled because of the change.

It was held in the Q. B., Richards, C. J., doubting, that on the contract for not sending as directed defendants were liable only for nominal damages, the loss by fire being too remote; and, Richards, C. J., dissenting, that they were not liable in trover.

On appeal, *Held*, reversing the judgment, that defendants were liable on the contract for the value of the goods.—*Wallace et al v. Swift et al*, 523.

See ESTOPPEL.—SHIPPING, 2.

CERTIORARI.

See CRIMINAL LAW.

CHAMPERTY.

Pleading—Champerty—Contract—Illegal agreement made part of the consideration.—The plaintiffs declared that one J. R. owned a lot on which there was a mine, and the plaintiffs agreed with E. and G. respectively, that if they would procure a bond (set out) from R. to convey the mine to the plaintiffs for \$20,000, the plaintiffs would pay to each of them \$1,000, whereupon E. and G. procured from R. such bond and delivered it to the plaintiffs; and the defendant afterwards, on the 1st February, 1867, made an agreement with the plaintiffs (set out) by which the defendant and others agreed, among other things, to buy the mine for \$40,000, to carry on at their expense a suit then pending in Chancery, to deposit the money required therein as security for costs, and to give the plaintiffs each an interest of one-twentieth in the mine, provided the issue of said suit should give the plaintiffs a good title thereto, and to settle any claims by E. and G. against the plaintiffs. The declaration then alleged that afterwards E. and G. recovered judgments against the plaintiffs for the said sums of \$1,000 each; that the plaintiffs and the now defendants and others filed a bill in Chancery to restrain certain persons, to whom R. and others had sold the same interests sold to the plaintiffs, from working said mine, and for specific performance of R.'s bond to the plaintiffs: that the defendants in said bill answered that the plaintiffs therein, by their agreement of the 1st of February, 1867, above stated, had been guilty

of champerty and maintenance, and so should have no relief—to which the plaintiffs therein joined issue: that other persons named, claiming under R., filed a bill against the now plaintiffs and defendants, charging that said agreement was void for champerty and maintenance, to which defendants answered that it was not so void: that both the suits were brought to a hearing, at which all parties came to a compromise, and consented to a decree, by which, among other things, a certain portion of the land was to be conveyed to one G. as trustee for a company to be incorporated for carrying on the mine, and the moneys paid into the Court, including the sum deposited by the now defendants as security for costs in the Chancery suit, were to be disposed of as directed: that the money was paid out and conveyances made as decreed, and the company formed, in which defendants were stockholders, and worked the mine; and that all the land and benefits decreed to such company arose out of the agreement made by the plaintiffs with E. and G. and their agreement with R.—And the plaintiffs alleged that, in *consideration of the premises*, the defendants agreed to pay the plaintiffs the amount of the judgments recovered against them by E. and G., but did not pay.

Held, that the declaration was bad, for the promise was not based on the transactions subsequent to the agreement of the 1st February, 1867, which agreement had been held void for champerty, 30 U. C. R 217, but that agreement was alleged to be part of the consideration, and being bad avoided the whole contract.

Held, also, that the denial by these defendants, in their answer in

Chancery, that the agreement was illegal could not estop them from asserting such illegality here.—*Carr et al. v. Tannahill et al.* 201.

CLERK OF THE PROCESS.

What writs he should issue.—See ATTACHMENT.

COMMISSION.

Commission on sale of land--Right to recover—Terms specified not obtained—Common counts.—Defendant agreed with the plaintiff that if the plaintiff would find him a purchaser for his farm at \$6,000, and get not less than \$1,000 down, he would pay him \$200. The plaintiff found a purchaser at \$6,000, who paid only \$500 down, but the defendant accepted and sold to him, and it was proved that after the sale defendant promised the plaintiff to pay him the \$200. The Judge of the County Court, before whom the case was tried without a jury, having found for the plaintiff for \$200 upon the common count:

Held, on appeal, that defendant having accepted and dealt with the purchaser found by the plaintiff, though not such a purchaser as the agreement called for, the plaintiff was entitled to recover the value of his services on the common count; and that, as defendant had promised to pay the \$200, the verdict was right.—*Wy-cott v. Campbell*, 584.

COMMON COUNTS.

See COMMISSION—CONTRACT.

COMMON SCHOOLS.

1. *Colored people—Right of admission to schools—Mandamus.*—In

answer to an application for a mandamus to the school trustees of a town to admit the applicant's son, a colored boy, to the public school in his ward, it was sworn that since 1846 a school had been set apart for the colored inhabitants, and that the school to which admission was desired was overcrowded, and had no room for any additional children. There was, however, no separate school legally established for colored people, the Act authorizing such schools having been passed after the setting apart of the school above mentioned:

Held, that on the ground only of want of accommodation the writ must be refused; but as admission had been refused on account of the boy's color, the trustees were ordered to pay the costs of the application.—*In re Hutchinson and the Board of School Trustees of St. Catharines*, 274.

2. *Alteration of school section—Application to quash by-law--Repeal.*—While an application to quash a by-law, No. 250, altering the boundaries of school sections 15 and 16, was pending, the corporation passed a by-law, No. 268, to remove doubts in regard to the former by-law and to confirm it, but so worded as to leave it doubtful whether it was not in effect an independent by-law, defining the limits of these sections. The first by-law was quashed, and an application was then made to quash this last by-law. It appeared, on shewing cause, that it had been repealed.

The Court, under the circumstances, quashed the by-law, notwithstanding its repeal; for the repealing by-law being, in effect, a by-law making an alteration in school sections, it could not take effect until

the 25th December following, and it was stated that the trustees of section 15 intended to act under the by-law to be repealed.—*Patterson and the Corporation of the Township of Hope*, 360.

COMPUTATION OF TIME.

See ELECTIONS, 2—TAXES.

CONFLICT OF LAWS.

See MARRIAGE.

CONTRACT.

Contract to perform work—Failure to complete by time specified—Acceptance.—Declaration, that the plaintiffs agreed to construct an engine for defendant, and to put the same into a certain steamer ready for service by the 1st of April, 1871, the plaintiffs to pay \$100 a day if not completed by the 15th; and the defendant agreed to pay therefor certain sums in cash, and to give endorsed notes for other sums, the last note to be payable on the 1st July, 1872. And the plaintiffs averred that they did not complete the work by the 1st of April, nor until a short time after the time fixed by the agreement, but that they did complete it within such further period, and defendant accepted and has since enjoyed and used it, and with this exception all things were performed, &c.; and although defendant paid the sums payable in money, yet he had not given the note to fall due on the 1st July, 1872.

Held, that the declaration was good, for that the acceptance enabled the plaintiffs to sue upon the agreement, and not upon the common counts only.

Semble per *Wilson, J.*, that it would have been better to aver a dispensation or waiver of the time fixed.—*Beckett et al v. Cockburn*, 610.

See BOUGHT AND SOLD NOTES—CHAMPERTY—COMMISSION—SALE OF GOODS—SALE OF LAND.

CONTROVERTED ELECTIONS.

See ELECTIONS.

CONVICTION.

Held, following *Haacke v. Adamson*, 14 C. P. 201, that an order or conviction not under seal need not be quashed, under C. S. U. C. ch. 126, sec. 3, before action brought for anything done under it.

The alleged conviction in this case was made under the supposed authority of C. S. U. C., ch. 75; but nothing appeared on the proceedings to shew the relation of master and servant, or any offence punishable under the Act.—*McDonald v. Stuckey*, 577.

CORPORATION.

See FALSE REPRESENTATION—MUNICIPAL CORPORATIONS,

COSTS.

1. *Abandonment of rule nisi—Costs.*—Where after a rule *nisi* for a mandamus had been served, the applicant gave notice that it would not be proceeded with, but did not offer to pay any costs, the Court on application discharged the rule with costs up to the time of the notice,

and costs of said application.—*Regina v. Justices of Huron*, 335.

See APPEAL—COMMON SCHOOLS, 1.
—REGISTRY LAWS.—SESSIONS.

COUNTY COURT.

1. *Jurisdiction—Title to land in question.*—Declaration : that one A. devised the north half of lot 15 to his son, W., in fee, and the south half to his wife, J., for life, and after her death to W. in fee : that during W.'s life he and his mother, J., leased to defendant the whole lot for five years, at an annual rent ; and that W. died soon after, having devised his land to the plaintiffs in fee. And the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J. after notice.

The defendant pleaded, on equitable grounds, that W. by his will devised all his lands to the plaintiff. in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent.

Held, that upon the pleadings the title to land was brought in question, and the jurisdiction of the County Court ousted.—*Fair et al. v. McCrow*, 599.

See APPEAL—SERVICE OF PAPERS.

COVENANT.

See DISTRESS.

CRIMINAL LAW.

1. *Quarter sessions—Jurisdiction*]
—The Court of Quarter Sessions has no jurisdiction to try the offence of forgery.

Semble, that on the evidence

stated in this case the testimony of the prosecutor, whose name had been forged to a note, was sufficiently corroborated.—*Regina v. McDonald*, 337.

2. *Perjury—Jurisdiction* — 32-33
Vic. ch. 23, sec. 8. D—Construction of.—This section applies to all cases of perjury, not merely to "Perjuries in Insurance cases," which is the heading under which secs. 4 to 12 are placed in the Act.

Held, therefore, that a magistrate in the County of Halton had jurisdiction to take an information, and to apprehend and bind over a person charged with perjury committed in the County of Wellington.

Held, also, that a recognizance to appear for trial on such charge at the Sessions was wrong, for that Court had no jurisdiction in perjury; but a *certiorari* to remove it was refused, as the time for appearance of the party had gone by.—*Regina v. Currie*, 582.

See ASSAULT.

DAMAGES.

1. *Contract to forward goods by specified route — Deviation — Remoteness of damage.*—See CARRIERS.

2. *Liquidated or unliquidated.*—*See* INSOLVENCY, 3.—HUSBAND AND WIFE, 1.

DATES.

Of Deed.—See DEED.

Alleged in pleading, how far available.—See LIMITATIONS, STATUTE OF, 3.

DEED.

Date of—Pleading.—Action for taking goods. Second plea: avowry

as bailiffs of W. H. for rent due by one W. B., the goods being on the demised premises. Second replication thereto: that said W. H. after the demise, by deed bearing date 30th October, 1869, granted to the plaintiff in fee the land mentioned in the plea, whereby the plaintiff became entitled to the rent from W. B., and W. H. at the said time when, &c., had no interest in the lands: *Held*, that the replication sufficiently shewed that the deed was made before the distress, for it must be assumed to have been delivered on the day it bore date.—*Hayward v. Thacker et al.* 427.

Attempt to vary by parol evidence.]
See EVIDENCE.—PLEADING, 1.

DEFAMATION.

See SLANDER.

DEPARTURE.

See LIMITATIONS, STATUTE OF, 3.

DESCRIPTION OF LAND.

See WILL.

DISCONTINUANCE.

See LIMITATIONS, STATUTE OF.

DISTRESS.

Agreement—Construction—Pleading.]—Declaration, that the plaintiff and defendant and one D. entered into an agreement under seal, set out, which was in substance as follows: D. has sold to defendant his interest in certain land and mills (described) for £1,350, which was held in trust by said D. for the plaintiff, and has conveyed it to de-

fendant to be held in trust for the plaintiff, as it was held by D. The lien therefore which defendant has on said property is said sum of £1350 paid by him to D. Plaintiff agrees to pay defendant said £1,350 with interest, as follows (setting out the times of payment.) And further, D. delivers to defendant all the chattels on the premises, to be held in defendant's name, but for the plaintiff's benefit, and the business to be done in defendant's name, but the profits to go to the plaintiff. It was then alleged that the said agreement being in full force, the defendant, in breach thereof, distrained upon the plaintiff's goods, as his tenant, in the house he then dwelt in on the said premises, for £306, being, as the warrant of distress falsely alleged, the amount of rent due to defendant for the same on the 1st October then last, whereby the plaintiff, in order to obtain possession of his goods, was obliged to replevy them, and was put to great loss and expense, &c.

Held, that the declaration was bad, as not shewing a breach of any covenant contained in the agreement set out; for it was not alleged that the goods distrained were those mentioned in the deed, nor that the plaintiff was not defendant's tenant, nor that no rent was due, nor what proceedings were had in the replevin suit.—*Scott v. McCabe*, 220.

DIVISION COURTS.

Fi. Fa. from one division to be executed in another—32 Vic., ch. 23, secs. 18, 19 O.]—1. A declaration against a Division Court bailiff for not levying under an execution alleged that the plaintiff recovered

a judgment in the first Division Court of the County, and thereupon sued out an execution directed to defendant as bailiff of the second Division Court, commanding him to make the money out of the goods of defendant in the suit, wheresoever the same might be found; and that there were goods of such defendant within the bailiwick of defendant, out of which he could have levied.

Held, that the count was bad: that the writ was not shewn to be within the Act 32 Vic., ch 23, secs. 18, 19, O. for it was not alleged that the fi. fa. was to be executed in the defendant's division or near to it, or that the goods were within such division, the defendant's "bailiwick" extending to the whole county.—*Davy v. Johnson*, 153.

2. No person except a barrister or attorney duly qualified is entitled to prosecute or defend suits in the Division Courts.—*In re The Judge of the County of York*, 267.

[But see 35 Vic. ch. 8 O. since passed.]

EJECTMENT.

Judgment in ejectment—Effect of in evidence—Proof of title—Notice under C. S. U. C. ch. 27, sec. 17.—In ejectment the plaintiff claimed under a deed from E., M., and T. The defendants shewed no title. It appeared that E., on the 26th June, 1856, recovered judgment in ejectment for the land against one of the defendants under whom the other claimed in an action commenced on the 3rd of September, 1855, and the *Hab. Fac.* was returned executed on 21st July, 1856, possession having been delivered to the plaintiff's agent, who held it for two or three years. It also appeared that on the 17th

March, 1858, the same defendant brought ejectment against E. and the other two plaintiffs herein, and was nonsuited. How he afterwards obtained possession did not appear.

Numerous objections were taken to the plaintiffs' proof of title prior to September, 1855:—to the evidence of identity—to the custody from which ancient deeds were produced—to the want of proof of the death of trustees recited in the deeds appointing others in their place—to the proof and effect of proceedings in Chancery with respect to certain lunacies—and that a term of 1,000 years created by will in 1806 was still outstanding.

Held, that the defendants could not dispute the plaintiffs' title further back than the 3rd September, 1855, the judgment in ejectment being evidence of their title at that time as against the defendant, in that suit who shewed no title in himself.

Held, also, that under the circumstances, the plaintiffs by serving a notice under C. S. U. C. ch. 27, sec. 17, might have compelled the defendants to shew title.—*Thompson et al. v. Hall et al.*, 367.

See RAILWAYS, 3.

ELECTION.

To become a British subject.—See ALIENAGE.

ELECTIONS.

1. *Legislative Assembly—Resignation—Vacancy*—32 Vic. ch. 4, secs. 10, 12, 13, 14.]—Sections 10, and 12 of 32 Vic., ch. 4, O., provide that a member may resign, 1, by giving notice in his place of his intention, 2. By delivering to the Speaker a declaration of such intention, either during a session or in

the interval between two sessions; or, 3. By delivering it to any two members, in case there is no Speaker, and the resignation is made in the interval between two sessions. *Held*, to mean only an interval between two sessions of the same assembly, and not to apply to the interval between the last general election and the election of a Speaker.

Section 13 provides for a new election in case of a vacancy happening by the death of any member, or by his accepting any office, or by his becoming a party to any contract, as mentioned in the third section. And section 14 for the case of a vacancy arising subsequently to a general election, and before the first meeting of the assembly thereafter, "by reason of the death or other of the causes aforesaid."

Held, that the "other of the causes aforesaid" were the two other causes besides death mentioned in section 13; and that a voluntary resignation, therefore, did not create a vacancy within section 14.—*In re the Election for the West Riding of Durham*, 404.

2. *Controverted Elections Act of 1871 — Presentation of Petition — Computation of time.*—The Interpretation Act of Ontario, 31 Vic. ch. 1, sec. 6, and sub-sec. 13, enacts that in construing it or any Act of Ontario, certain days specified, including Good Friday and Easter Monday, shall be included in the word holiday; and the Controverted Elections Act of 1871, section 52, enacts that in reckoning time for the purposes of that Act, any day set apart by any Act of Ontario for a public holiday shall be excluded.

Held, that the effect of the Interpretation Act alone, independently of any other statute, was to make

the days mentioned in it holidays: and if this were not so, that when the other statute used the word holiday, such days would by virtue of the Interpretation Act be included in it.

Held, therefore, that in reckoning the twenty-one days after the return allowed for the presentation of a petition, Good Friday and Easter Monday must be excluded.

The decision in Chambers in this matter, 7 C. L. J. N. S. 179, affirmed as regards the computation of time.—*In the matter of the Election for the West Riding of the City of Toronto*, 409.

ESTATE.

See HUSBAND AND WIFE, 2.

WILL, 2.

ESTOPPEL.

R. W. Co.—Receipt of goods—Estoppel by.—Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get them from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it that "rates and weight entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship, or afterwards.

Held, that defendants were not estopped by their statement of weight in the receipt, and were not

liable to the plaintiff.—*Horseman v. Grand Trunk Railway Co. of Canada, (In Appeal), 535.*

By answer in Chancery.—See CHAMPERTY.

Against denial of being a shareholder.—See RAILWAYS, 1.

Against denying Landlord's title.—See LANDLORD AND TENANT, 1.

Against denial of right to distrain.—See LANDLORD AND TENANT, 2.

EVIDENCE.

Deed—Attempt to vary by parol—Pleading.—Declaration, that defendant leased certain land from the plaintiff for a year, and covenanted to purchase it within the term, or to pay the interest for a year on a mortgage given by the plaintiff on the land, but did neither.

Plea, that it was agreed by the same deed, that if the plaintiff should during the term sell the land to another, defendant should not pay the interest; and that the plaintiff sold and defendant gave up possession to the purchaser. Replication, that before the time expired defendant notified the plaintiff that he would not purchase, and requested him to sell, and that the plaintiff in consequence sold, but subject to the defendant's term, which is the sale alleged in the plea.

Held, after verdict for the plaintiff, that the replication was bad, as attempting to vary the deed by a parol agreement; and a verdict was entered for defendant.—*Malott v. Carscadden, 363.*

Of agency.—See PRINCIPAL AND AGENT.

Of contract.—See SALE OF GOODS.

Of ancient documents.—See ALIENAGE.

See PARTNERSHIP—WILL.

EXECUTION.

See DIVISION COURTS, 1.

EXECUTORS.

Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for \$700, alleging non-payment; and on the common counts. Sixth plea: set-off on two promissory notes made by the plaintiff payable to F. & W. and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff.

Third replication, equitable: that the causes of action sued for accrued to the plaintiff as executor of one P., and not otherwise, for goods sold by plaintiff to defendant, which goods were assets of the estate, as will be the money sued for if recovered; and the plaintiff sues for the benefit of the estate only:

Held, that the replication was bad, for, among other reasons, the plaintiff on the transaction appearing would be personally liable.—*Parsons v. Crabb, 434.*

Liability of, on promissory notes.—NOTES—] See LIMITATIONS, STATUTE OF, 3.

EX PARTE ORDER.

Necessity for stating all the facts on application for.—See INFANTS.

FALSE IMPRISONMENT.

Necessity for quashing conviction before action for.—See CONVICTION.

FIRE.

Injury by.—See RAILWAYS, 2.

FOREIGN LAW.

See ATTORNEY—BANKRUPTCY.

FORGERY.

See CRIMINAL LAW.

FRAUD.

See BANKRUPTCY—FALSE REPRESENTATION.—LANDLORD AND TENANT, 1.—RAILWAYS, 1.

FRAUDS, STATUTE OF.

Contract not to be performed within a year.—The plaintiff, on the 29th of July, agreed with defendants verbally to enter their service as book-keeper on the 1st of September following, for a year from that day:

Held, a contract not to be performed within a year from the making thereof, and within the Statute of Frauds.—*Dickson v. Jacques et al.* 141.

FREIGHT.

See SHIPPING, 1.

HIGHWAYS.

1. *Road between townships—Dedication—Power to close.*—A road had for more than fifty years been used as the road between the townships of York and Vaughan, the original road allowance being to the north of it, and this road being in fact wholly within the township of York and part of lot 25. The owner of the lot had been indicted for closing up this road and con-

victed in 1870; and the corporation of York then passed a by-law to close it, reciting that there was no further necessity for it by reason of the road allowance.

Held, there being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, that this was a road dividing different townships, over which the County Council only had jurisdiction; and that the by-law therefore was illegal.

Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication.

Quære, whether any one can add to a public allowance for road by dedication, so as to compel the local authorities to repair it.—*In re McBride and the Corporation of the Township of York*, 355.

2. *By-law to close and sell road allowance.*—A township corporation passed two by-laws—one, No. 145, providing that certain original allowances for roads described should be closed and sold by auction on a day named, due notice being first given; the other, No. 146, was to close up that portion of the original allowance for road between lots 32 and 33 in the fourth concession, lying north of the centre of the said lots (which forms the northerly boundary of Freeman's land, and south of the lands owned by C. B. and T. K., the applicants) and comprising that portion of the said road allowance dividing the seven acres of land belonging to the heirs of the late M. C., and now occupied by Mrs. Joice, and to sell the same to Mrs. Joice at a price named.

Held, as to by-law 145, upon the contradictory affidavits set out be-

low, that the objection for want of the necessary notices before passing such by-law was not sustained, there being also the fact that the applicants were heard several times in opposition to the by-law, but never raised this objection.

2. As to both by-laws, that it was not objectionable to provide for selling, as well as for closing up the allowance.

3. Nor, as to by-law 145, that it provided for closing and selling the allowance by public auction, without providing for the rights of the owners of adjoining lands, for it was shewn that such owner became the purchaser.

Semble, that it might be sufficient to offer the old allowance *at the auction* to the owner of the adjoining land, and on his refusal to proceed with the sale.

As to by-law 146, it was objected that it provided for the sale to Mrs. Joice, while it shewed on the face of it that the adjoining land was owned by others. It appeared that M. C. had died intestate, leaving children under age, and that Mrs. Joice was his widow. M. C. was not shewn to have been the owner, except by the statement in the by-law, and Mrs. Joice swore that she had owned the land for five years. *Held*, that this objection failed. *Held*, also, that the road closed up by this by-law was sufficiently described. It was objected, also, that the notice of the intended passing of this by-law described it as a by-law for closing up and selling the original allowance between lots 32 and 33, while the by-law as passed was to close up only a small portion of it. *Held*, no objection.—*Barker et al and The Corporation of the Township of Saltfleet*, 386.

HOLIDAY.

See ELECTIONS, 2.

HORSE.

See ACTION.

HUSBAND AND WIFE.

1. *Action by husband for not attending wife during illness—Damages recoverable.*]—The plaintiff sued defendant for neglecting, as a medical man, to attend upon his wife during child-birth, alleging the contract in one count to be to attend at 3 p.m., on the 12th April, and in another count to attend when notified. *Held*, that upon the evidence stated in the case a contract and breach of it were shewn, which, with proper amendments as pointed out in the case, would support the declaration; but

Held, also, that the plaintiff in this action could not recover for the personal injury and suffering of the wife.—*Hunter v. Ogden*, 132.

2. *Conveyance to husband and wife—Effect of—C. S. U. C. ch. 82, sec. 10*—The effect of Consol. Stat. U. C. ch. 82, sec. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy.

Held, therefore, that a conveyance of land to a husband and wife in fee did not make them tenants in common; but that they held, as before the statute, by entireties, and that on the husband's death the wife took the whole estate.—*In the matter of Partition between Shaver et. al. and Hart et al.*, 603.

ILLEGALITY.

See ATTORNEY — CHAMPERTY — RAILWAYS, 1.

INFANTS.

Infants under 12—Custody of—C. S. U. C. ch. 74—Appeal from Judge's order—Practice—Ex parte order—Facts insufficiently stated.]

—A married woman living apart from her husband petitioned, under C. S. U. C. ch 74, sec. 8, for the custody of her children under the age of 12. The grounds stated were, that she was then living apart from her husband, having been about six weeks before forbidden his house, without any sufficient reason: that one of the children had since the separation been living with her with his consent, but he had withheld the others: that if for no other reason than that he was Mayor of the town, and so more or less occupied with public duties, he was quite incompetent to take proper care of them, and she was informed that they were neglected, and the health of the youngest, being delicate, was endangered, &c.; and that she had delayed making the application, being induced to believe he would give up the other two children. Upon this petition, verified by affidavits, an *ex parte* order was made on the 3rd of July, 1860, for the delivery of the children to the petitioner, to be kept by her within the jurisdiction, and sent from time to time to see their father if desired; the question of the amount to be allowed by him for their maintenance to be reserved for a future application. It was urged to the Judge, though not stated in the affidavits, as a reason for making the order *ex parte*, that if notice of the

application were given the children would be removed beyond the jurisdiction, as they could be immediately, the father living upon the frontier.

On the 12th of July, the father applied to the same Judge to rescind this order, as having been made improvidently, and without notice to him, and because the facts had been misrepresented. In support of this application it was shewn that in an action against him, brought by his wife's father, tried in May previous, she, as a witness, charged him with a crime, in consequence of which they separated, upon an arrangement that she should take with her one child, and see the others daily, he providing for her support. It was also alleged that the wife had used very improper language towards him, and had absented herself from home to the neglect of her children; and the statements in the petition as to the health of the children and his neglect of them were denied.

This summons was answered by numerous affidavits, wholly denying his charges, asserting her good conduct and character, and alleging against him cruel treatment and neglect of his wife, and injurious teaching of the children. A deed of separation was also filed, executed between them in 1852, which gave her the sole control of the children, then or thereafter to be born, in consequence of the cause of separation being such as in England would call from the Ecclesiastical Courts for a divorce *a mensâ et thoro*, and would justify their removal from him, which causes it was said in the deed to be unnecessary to specify.

The husband filed additional affi-

avits supporting his original case, and recriminating against his wife; and on the 20th of August the summons was discharged, leaving the original order to stand.

Held, Morrison, J., dissenting,

1. That an appeal would lie to the Court from the Judge's order.

The cases in, and the principles upon which, an appeal is or is not allowed reviewed by Wilson, J.

2. That admitting the right to make an *ex parte* order in case of necessity, no sufficient ground was shewn for it here.

3. That the facts had not been properly stated in the first application, the real reason for the applicant leaving her husband's house and the arrangement then made between them having been withheld.

4. That the subsequent hearing of both sides upon the merits did not preclude the husband from taking advantage of these objections against the original order, which was therefore set aside.

5. *Per Wilson, J.*, that upon the whole case enough was not shewn to warrant an order for depriving the father of the custody of the children; and the deed of 1852 could not be given effect to as regarded children born by a cohabitation renewed after it and continued ever since.

In reply to the affidavits filed by the wife in shewing cause to the summons to rescind the first order, the husband desired to file affidavits in answer to the recriminatory charges which had been made on her part; but the learned Judge refused this. *Per Wilson, J.*, this was a matter within his discretion. *In re Allen et al*, 458.

INFORMATION.

Before magistrate—Right to withdraw or amend.]—See ASSAULT.

INNKEEPER.

Liability of, for negligence in care of horse.]—See ACTION.

INSANITY.

Right to set up to avoid deed.]—Action for taking goods. Second plea: avowry as bailiffs of W. H. for rent due by one W. B., the goods being on the demised premises. Second replication thereto, that said W. H. after the demise, by deed bearing date 30th October, 1869, granted to the plaintiff in fee the land mentioned in the plea, whereby the plaintiff became entitled to the rent from W. B., and W. H. at the said time when &c., had no interest in the lands.

Third replication that on the 7th May, 1870, the said W. B., the tenant, by deed released to the plaintiff all his estate in the land, and the landlord, the said W. H. in consideration thereof released the tenant from the rent and covenants.

Third plea: avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication: that before the demise one W. H. was seized in fee of the land, and by deed dated 30th October, 1869, granted it to plaintiff, who entered and took possession, and held it as owner in fee at the time of the distress.

The defendants rejoined to each of the above replications, that at the time of making the alleged deed W. H. was of unsound mind and incapable of executing and understanding the same, as the plaintiff then well knew. *Held*, rejoinders

good, for that the defendant was entitled to set up such defence.—*Hayward v. Thacker et al.* 427.

INSOLVENCY.

1. *Separate assignments by partners—Appeal from Assignee.*—E., living at Brantford, and James and John G., living in Dundas, carried on business at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an official assignee in that county. On the following day E. made an assignment of his estate, under the Act, to an interim assignee in the County of Brant, and F. was afterwards appointed assignee by the creditors. K. & Co., creditors of E. & Co., filed a claim in Brant under E.'s assignment, which other creditors objected to, and the assignee, having heard the parties, made his award:

Held, that the County Court Judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal.—*In re McKenzie et al. and the Judge of the County Court of Brant*, 1.

2. *Insolvent Act of 1864—Rights of secured creditors.*—The insolvent, in February, 1868, executed a mortgage on lands and an assign-

ment of goods to trustees for the benefit of B. G. & Co., and other creditors named; and in August following he made a voluntary assignment under the Insolvent Act. The trustees after this assignment sold part of the real estate under the power of sale, and received part of the proceeds of the goods. B. G. & Co. then claimed to prove against the estate for the balance due to them above what they had received from the trustees.

The official assignee held that they had lost their right, having elected to look to their security instead of bringing it under sec. 5, sub-sec. 5, of the Insolvent Act of 1864; and his award was confirmed by the County Judge on appeal:

Held, Morrison, J., dissenting, that the mere fact of the sale did not necessarily exclude them from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced, or were recompensed for any loss thereby, they should still be allowed to prove.—*In re Hurst, an Insolvent*, 116.

3. *Nature of claim—Debt or unliquidated damages.*—The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with.

Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent: that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground: that they might waive the tort and sue for the value

of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages.

Held, also, that a claim for compensation as to a certain number of barrels which turned out not to be of the quality agreed for was clearly a claim for unliquidated damages, and could not be proved.—*In re Williams et al*, 143.

4. *Insolvent Act of 1869, sec. 89*—*Sale within thirty days—Pressure.*—Under sec. 89, of the Insolvent Act of 1869, the presumption that transactions within thirty days next before the assignment, &c., were made in contemplation of insolvency, is not conclusive, but may be rebutted.

In this case the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for \$900, of which \$400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in, and on the 9th he purchased from the insolvent about \$1,400 worth of pork, on condition that \$600 should go upon the mortgage, and he paid the balance of the purchase money to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought this suit against the creditor to avoid the transaction. The creditor said he did not wish to press the debtor in any way, but wanted his money. The debtor owed about \$3000, and his property produced only \$1,000. There was contradictory evidence as to defendant knowing or having probable cause for believing that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth

more than the balance left due upon it. The jury having found in favor of the defendant, the creditor, the Court held that the transaction was not avoided by force of the statute; and upon the facts they refused to interfere.

Held, also, that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases.—*Campbell, assignee of Chalmers an Insolvent, v. Barrie*, 279.

4. *Mortgage—Pressure.*—The insolvent, an innkeeper, on the 12th of August, 1869, gave the plaintiff a mortgage upon the whole of his property, payable in six months, for an over-due debt. The attachment in insolvency issued on the 6th December following, and the assignee seized and sold the goods.

The evidence shewed that the mortgagor knew or had strong reasons to believe himself to be insolvent when he gave the mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors.

Held, that under these circumstances it was not void under the Insolvent Act as against the assignee.—*Archibald v. Haldan*, 295.

See BANKRUPTCY.

INSURANCE.

2. *Policy—Condition—Notice of other insurance.*—One of the conditions of an insurance policy was: "Persons who have insured property with this Company shall give notice of any other insurance already made or which shall hereafter be made elsewhere on the same property, so

that a memorandum of such other insurance may be indorsed on the policy or policies effected with this Company," &c.

After the policy had been assigned, the assignees effected another insurance, of which the only notice given, if any, was a verbal one to P., the agent of the Company at Sarnia, their head office being in Montreal, and not endorsed on the policy, which was not produced at the time.

Held, affirming the judgment of the Queen's Bench, that such notice was insufficient, **RICHARDS, C. J.**, **MOWAT, V. C.**, and **STRONG, V. C.**, dissenting. — *Hendrickson v. The Queen Insurance Company (In Appeal)*, 547.

2. *Marine policy—Unseaworthiness—Cause of loss.*]—Action on a policy on a vessel, alleging a total loss. Plea, that the plaintiff knowingly and wrongfully sent the vessel from the port of Toronto in an unseaworthy state, and permitted her to remain on the lake in such state, and without being properly equipped, and that by reason of the premises only the vessel was wrecked and lost.

Held, that the plea was not proved by shewing that the vessel was unseaworthy when she was wrecked, unless such unseaworthiness was the immediate cause of the loss. — *Woodhouse v. The Provincial Insurance Company*, 176.

IRREGULARITY.

See SERVICE OF PAPERS.

JOINT TENANCY.

See HUSBAND AND WIFE, 2.

JUDGMENT.

In ejectment, effect of in evidence.] See EJECTMENT.

JURY.

Waiver of notice for.]—See TRIAL.

JUS TERTII.

See SALE OF GOODS, 2.

JUSTICE OF THE PEACE.

See ASSAULT

LANDLORD AND TENANT.

1. *Fraud of Tenant—Apportionment of rent.*]—In ejectment it appeared that one C. B. had leased from the plaintiff part of the property, and being in possession gave it up for \$60 to the defendant, who claimed that it was her own. *Held*, that this was clearly a fraud upon the plaintiff, as landlord, by which the lease was forfeited, and that the defendant could not set up C. B.'s rights under it.

Semble, The plaintiff having let part of the premises held by C. B. to B. B., who went into possession, and no rent being apportioned for the remainder, that this operated as a surrender of C. B.'s lease. — *Kyle v. Stocks*, 47.

2. *Right of distress—Estoppel.*]—Action for taking goods. Second plea: avowry as bailiffs of W. H. for rent due by one W. B., the goods being on the demised premises:

Third replication: that on the 7th of May, 1870, the tenant, by deed, released to the plaintiff all his estate in the land, and the landlord,

in consideration thereof, released the tenant from the rent and covenants.

Held, good, for though the plaintiff would be estopped from denying the landlord's right to distrain, the release shewed that no rent was payable.

Third plea: Avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication: that before the demise one W. H. was seized in fee of the land, and, by deed dated 30th October, 1869, granted it to the plaintiff, who entered and took possession, and held it as owner in fee at the time of the distress. It was objected that, consistently with this replication, A. H. might have held such an interest in the land as would enable him to make the lease prior and paramount to the plaintiff's title. *Held*, replication clearly good.—*Hayward v. Thacker, et al.* 427.

3. *Agreement to pay taxes—Yearly tenancy.*—Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it, on condition that he should pay the taxes on both lots; and M. accordingly went on, and built, and paid the taxes for several years. *Held*, that a yearly tenancy had been created, and that D. could not eject M.'s sub-tenant without notice to quit.—*Davis v. McKinnon*, 564.

LAW REFORM ACT OF 1868.

See TRIAL.

LEASE.

Lease or agreement for lease.—In ejectment the plaintiff claimed as having been turned out of his

possession by defendant without color of right. The defendant claimed under the Grand River Navigation Co., but at the trial he shewed no title.

As to a portion of the property, a saw mill, one B. B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease, but on Monday the defendant put some one else in possession, and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon. *Held*, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title.—*Kyle v. Stocks*, 47.

See LANDLORD AND TENANT

LEGISLATURE.

See ELECTIONS.

LETTERS PATENT FOR INVENTION.

See PATENT.

LIMITATIONS, STATUTE OF.

1. *Ejectment—Statute of Limitations.*—In ejectment, it appeared that the mother of defendant, owning the land, lived upon it until her death in 1854. The defendant, who was the eldest son, and four other children, then lived with her, and there were four others, making nine entitled to inherit. In 1858 the defendant conveyed one-ninth to his brother-in-law, who conveyed to the plaintiff, and the plaintiff's title to this was admitted; but defendant claimed the remaining

eight-ninths by possession. He swore that when he came of age, in 1846, his mother verbally gave him the land, and promised to deed it to him, and that he had been assessed for it ever since; but she had lived on it with him until her death, which was within twenty years.

Held, that defendant had no possession as against the mother during her life, and that he therefore must fail.—*William Orr v. Samuel Orr*, 13.

2. *Ejectment—Statute of Limitations.*—In ejectment, the plaintiff claimed as heir-at-law of his mother, T., a daughter of H. H. died in 1839, having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then 18, and they lived with her mother, he working the land, until 1844. T. died in 1848. About 1868 the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title to the land by length of possession.

Held, that the estate of the plaintiff's father in right of his wife being one for which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during his father's life.

Semble, that on the father's death he would still be barred, though he had never been in a position to sue.—*Trickey v. Seeley et al.*, 214.

3. *Plea, set-off—Replication, Statute of Limitations—Rejoinder, time allowed to expire by agreement in prior suit—Surrejoinder, violation of agreement.*—*Declaration* on a spe-

cial agreement, by which the plaintiff sold to defendant a steam engine for \$700, alleging non-payment; and on the common counts.

Sixth plea: set-off on two promissory notes made by the plaintiff payable to F. & W., and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff.

Second replication: Statute of Limitations.

Equitable rejoinder, so far as the replication relates to the two notes set up in the plea: that on the 6th of December, 1862, and before this suit, and before the notes were barred by the Statute, the plaintiff sued defendant in the Q. B. for the same causes of action now sued for: that defendant on the 4th of March, 1863, pleaded by way of set-off therein the same notes, which exceeded plaintiff's claim, and which were overdue but not then barred, and required the plaintiff to reply thereto: that the plaintiff did not reply and did nothing in the suit until October, 1868, when said notes had become barred by the Statute, and thereupon the plaintiff discontinued said suit, and commenced this action. And defendant avers that at the plaintiff's request he did not sign judgment of *non pros* in said suit, as he could and would have done; and it was then agreed that in consideration that he would not sign judgment the said two notes should be allowed against the plaintiff's claim, and they were then mutually set-off and allowed against it: that defendant, relying on such request and agreement, took no further step in the suit, or to recover his set-off, but allowed it to be so set off against the plaintiff's claim, which was thereby fully paid and satisfied. And de-

defendant says that it is inequitable that the plaintiff should now be allowed to maintain this action, and defeat defendant's set-off by the Statute of Limitations.

Surrejoinder, on equitable grounds, that defendant waived and forfeited his rights under the alleged agreement by giving the plaintiff, before the discontinuance of the former and the commencement of this action, to wit on the 30th September, 1868, notice of his intention to proceed in the first action by entering judgment of *non pros* for want of a replication, and by accepting his costs of defence taxed on the plaintiff's rule to discontinue.

Held, upon demurrer: 1. That the agreement might have been pleaded as an accord and satisfaction to the declaration; but that defendant might nevertheless rely on the set-off, and set up the agreement in answer to the Statute.

2. That the rejoinder shewed a good answer to the replication.

Seemle, that the rejoinder, without reference to the agreement, would have been sufficient if it had alleged that the present set-off was pleaded within a reasonable time for bringing an action for such set-off after the termination of the first suit, to wit within one year therefrom; for that the previous suit ended by discontinuance was a good answer to the Statute. But *Seemle*, also, that without such averment it was bad, and that the dates appearing on the record could not be allowed to supply it.

Held, also, that the rejoinder was not a departure from the plea.

Held, also, that the surrejoinder was good, for the defendant had lost his right to the costs, if they could be recovered only by signing judgment which he had agreed not to

sign: that the termination of the first action remitted both parties to their original rights, and defeated the accord and satisfaction between them; but that the defendant having broken the agreement, the remission related back only to such rights as they existed when the suit ended.

Seemle, also, that in no way could the defendant by pleading avoid the replication and rely upon the equity of the Statute, for that the agreement and its waiver excluded that ground of defence.—*Parsons v. Crabb*, 434.

See RAILWAYS, 2.

LIQUIDATED DAMAGES.

See INSOLVENCY, 3.

MAGISTRATE.

See ASSAULT.

MAINTENANCE.

See CHAMPERTY.

MANDAMUS.

See COMMON SCHOOLS, 1.—INSOLVENCY, 1.—REGISTRY LAWS.

MARRIAGE.

Marriage—Foreign law—Slavery]
—The plaintiff in ejectment claimed as heir of his father, H., who, it appeared, while a slave in the State of Virginia, had, in 1825, been married to the plaintiff's mother, S., also a slave. The marriage was performed by a Baptist minister, with the usual ceremony, and with all the formalities practicable to make it binding, but without a

license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there.

It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying: that to constitute a strict legal marriage between free persons a license was essential; but that slaves could not obtain it or in any way contract a legal marriage, being regarded by the law as property only, not persons.

It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia arising from the law of slavery which our law could not recognize; but

Held, otherwise; for the parties not being British subjects, as in *Ruding v. Smith*, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated.—*Harris v. Cooper*, 182.

MASTER AND SERVANT.

Negligence of servant—Liability of master.—The plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains,

and was thus taking two crow bars from Port Hope to a point on the line where his men were at work. As the train passed the spot C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggage man having nothing to do with him nor any right to meddle with his tools, nor did he ask him to put the bar out.

Held, that defendants were not responsible for the injury, for the baggage man was not acting as their servant or in pursuance of his employment. — *Cunningham v. The Grand Trunk Railway Company of Canada*, 350.

See CONVICTION—FRAUDS, STATUTE OF.

MAYOR.

Right of Corporation to remunerate.—See MUNICIPAL CORPORATIONS.

MEASURE OF DAMAGES.

See CARRIERS.

MEMORANDA.

See Pages 243, 522.

MINES.

See CHAMPERTY—SALE OF LAND.

MISREPRESENTATION.

See FALSE REPRESENTATION.

MONEY LENT.

Money advanced upon grain—Right of action.—The plaintiff, who was

a warehouseman and dealer in grain, received in his warehouse from defendant between the 1st and 14th of October, 832 bushels of barley; and between the 15th September and the 2nd November had advanced to defendant \$242. Disputes having arisen, defendant sued the plaintiff for the value of the barley, and the plaintiff sued defendant in this action for the advance as money lent. In the first suit the now plaintiff pleaded the money paid, and received the benefit of it. The jury in this action found that the money was advanced upon the grain, not to be repaid until the sale of the grain to the plaintiff or some one else, and that there was no sale to the plaintiff. *Held*, that this finding entitled defendant to a verdict.—*Trompou v. Crandall*, 9.

MORTGAGE.

See REGISTRY LAWS.

MUNICIPAL CORPORATIONS.

By-law—Right to remunerate the Mayor—Illegal appropriation—Municipal Act of 1866, secs. 123, 176, 177.—The corporation of a town, at their last meeting in the year, passed a resolution to present a complimentary address to the mayor, who had held the position for several years and was about to retire from it, and to grant him the sum of \$1,600 as a small token of their appreciation of his long and faithful services, and authorizing the chairman to sign an order upon the treasurer for that sum. On the same day they passed a by-law for

the payment of accounts passed for the year, giving a list of them, which the treasurer was directed to pay, and including this sum to be paid the mayor, "as per order of council." It appeared the whole taxes of the town for the year amounted only to \$3,325:

Held, that the by-law and resolution, as far as regarded the said payment, were beyond the power of the corporation, and must be quashed.—*McLean and the Corporation of the town of Cornwall*, 314.

See HIGHWAYS—TAXES.

NEGLIGENCE.

In tying up horses—See ACTION.
See MASTER AND SERVANT

NEW TRIAL.

Weight of evidence—Evidence of parties.—Where in an action against the maker of a promissory note, the plaintiff produced several witnesses who swore to the defendant's signature, which two of them said he had admitted, but the jury found for the defendant on his own evidence alone, the Court granted a new trial, with costs to abide the event.

Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties were admissible as witnesses.—*Canadian Bank of Commerce v. McMillan*, 596.

NISI PRIUS.

See TRIAL.

NONSUIT.

See BANKRUPTCY.

NOTICE OF ACTION.

Held, following *Neill v. McMillan*, 25 U. C. R. 485, that a notice of action describing the plaintiff's residence as of the township of B., in the County of P., was sufficient. — *McDonald v. Stuckey*, 577.

OTTAWA CITY PASSENGER R. W. CO.

See STREET RAILWAY.

PARLIAMENT.

See ELECTIONS.

PARTNERSHIP.

Declaration of partnership — 33 Vic. ch. 20, O. Penal Action.] — Sec. 6, of 33 Vic. ch. 20, O, by which the declaration of the names, &c., of a partnership required to be filed under that Act is made incontrovertible, does not apply to the case of a penal action brought against a member of the firm for neglecting to file such declaration. The preamble and general tenor of the Act shew that it was intended for cases in which a claim is made against the firm, or in which the partnership is concerned.

Where, therefore, such declaration was filed on the 6th July, 1870, and stated that the partnership existed since the 23rd of August, 1869: *Held*, that it was competent for defendants to prove that in fact it was not formed until the 1st July, 1870, so that declaration was filed in time — *Cassidy qui tam v. Henry*, 345.

See INSOLVENCY, 1.

PARTIES TO ACTIONS.

See ACTION.

PARTITION.

See APPEAL, 2.

PATENT FOR INVENTION.

Infringement of patent — *Public user before application* — *Patentee employed by defendants to make the invention* — 32-33 Vic. ch. 11, sec. 6, D. — *Subject of a patent.*] — The plaintiff obtained a patent for a new and useful improvement on machines for bending wood for making chairs and other purposes, and sued the defendants for infringement of it.

By the old process the wood to be bent for the back of a chair was placed on an iron strap, one end resting against a fixed shoulder upon the strap, the other confined by a movable shoulder which was tightened against the end of the wood by a wedge, in order to give the end pressure required to prevent the wood from breaking or splintering in bending. In the plaintiff's machine a screw was used in place of the wedge, and by it but not by the wedge, the pressure could conveniently be regulated and adjusted during the bending. With the wedge, too, only a single curve or semi-circle for the back of the chair could be accomplished, while by the plaintiff's machine the two ends of the back piece could be bent down, so as to connect with the seat or body of the chair as side pieces. This also was effected by end pressure with the screw; and the side piece and back were thus formed out of one piece by continuous pressure, instead of from separate pieces.

It appeared that a machine had been used for many years in the United States which performed the

same work as the plaintiff's, but it was too expensive. The plaintiff had been employed in defendants' factory in bending for about three months, and was asked by the foreman "to study up an invention or apparatus for bending chair stuff." He discovered the invention that same night, about the 1st of May, and next morning explained it at the factory. The machine was constructed there, defendants supplying the materials and the blacksmith's and carpenter's work, and was used there for chairs until about the 14th of July, when the plaintiff applied for a patent, many persons in defendants' employment being aware of its construction and operation. It appeared also, that other persons in the factory as well as the plaintiff had been employed in trying to devise such an apparatus, and that when this was found successful the manager said he would patent it for the factory, to which the plaintiff did not then object. The plaintiff never informed defendants of his application for the patent, which issued in October following.

Held, that there had been a public user of the invention with the plaintiff's consent and allowance before he applied for the patent, so as as to destroy his claim to it.

2. That the plaintiff having been employed by the defendants expressly to make or improve the machine, could not claim to be the inventor as against them.

Semle, that the use of the screw to produce the end pressure could not be the subject of a patent, though the construction of the side and back in one piece might be.—*Bonathan v. Bowmanville Furniture Manufacturing Company*, 413.

PERJURY.

See CRIMINAL LAW.

PLEADING.

1. *Action for rent—Pleading.*—To an action for rent due on a lease defendant pleaded, that after the lease the plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M., who claimed the rent :

Held, sufficient without averring that the conveyance was by deed.—*Perdue v. Hays et al.*, 111.

2. *Assignment—"Re-assignment"*—Declaration on a special agreement, by which the plaintiff sold to defendant a steam engine for \$700, alleging non-payment, and on the common counts.

Sixth plea, set-off on two promissory notes made by the plaintiff, payable to F. & W., and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff.

Fourth replication, equitable: that the causes of action accrued to the plaintiff as in the third replication alleged, and that before this suit the plaintiff and his co-executors assigned all the testator's estate, including these causes of action, to H. and M., in trust for the creditors of the estate; and the plaintiff sues for the estate and as a trustee only.

Equitable rejoinder: alleging, among other things, that before this suit said H. and M., at the request of the plaintiff and all persons interested, re-conveyed and re-assigned all the testator's estate and effects so conveyed to them, including the causes of action in this suit. And defendant joins issue on the residue of said replication :

Held, on demurrer, that the word

"re-assigned" implied that the property was assigned back to the assignors, and it would have been a breach of trust to assign to others; but that, there being no residue, there must be judgment for the plaintiff on demurrer as to that part of the rejoinder joining issue on the residue.—*Parsons v. Crabb*, 435.

See CHAMPERTY — DISTRESS — LANDLORD AND TENANT—LIMITATIONS, STATUTE OF, 3.

PRACTICE.

Form of rule to rescind order.—A rule to rescind a Judges order was drawn up "upon reading the affidavits and papers filed," not specifying that the papers used in Chambers were re-filed, or that they were brought up by leave of the Court :

Held, that, though it is better to specify this, the objection could not prevail here, for the rule shewed plainly that it was by way of appeal from proceedings in Chambers, the affidavits and papers filed there were expressly mentioned, and they were in fact re-filed, as appeared by an affidavit filed in shewing cause.

Held, also, that if the objection had prevailed the rule might have been at once amended.

Held, also, that in such cases the leave of the Court to use the papers in Chambers is unnecessary.—*In re Allen et al.* 458.

See APPEAL—ASSAULT—COSTS—INFANTS—SERVICE OF PAPERS—TRIAL.

PRESSURE.

See INSOLVENCY, 3, 4.

PRESUMPTIONS.

See ALIENAGE.

PRINCIPAL AND AGENT.

1. *Agency—Proof of.*—The facts being in substance the same as *Prince v. Lewis*, 21 C. P. 63, the Court followed that decision, holding that the agent was not authorized to purchase the goods for defendant, for non-acceptance of which the action was brought.

Per Richards, C. J.—A plaintiff in such a case seeking to recover damages by reason of the fall in price, must give clear proof of agency to bind defendant.—*Prince v. Lewis*, 244.

2. *False representation of authority to contract for Company—Action for — Want of Corporate seal—Pleading.*—Declaration, that a certain vessel insured in the Provincial Ins. Co. was sunk, and that defendant, who was the agent of the Company in effecting settlements on account of vessels lost or damaged, in consideration that the plaintiff would contract with defendant as and assuming to be the agent of the Company, to raise the vessel for \$3,100, the question of the liability to pay said sum to be referred to arbitration, defendant promised the plaintiff that he was authorized by the Company to enter into said contract as their agent, as follows, (the contract was then set out, made between the plaintiffs and the Company, and signed by the defendant for the Company) : that the plaintiffs entered into such contract with defendant as and assuming to be the agent of the Company, and raised the vessel; yet defendant was not authorized by the Company to make such contract, and refused to pay the plaintiffs the \$3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the con-

tract against the Company, and were put to expense, &c.

Plea: that the plaintiffs were unable to enforce the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the Company:

Held, on demurrer, 1. That there was no assertion in the declaration of defendant being the agent inconsistent with the allegation of his want of authority.

2. That the plea shewed no defence, for if defendant had been authorized as he represented, the Company could have been compelled in equity to affix their seal to the contract.—*Calvin et al. v. Davidson*, 396.

Right to Commission.—See COMMISSION.

See FALSE REPRESENTATION.

PROCESS.

Clerk of.—See ATTACHMENT.

QUARTER SESSIONS.

See CRIMINAL LAW—SESSIONS.

RAILWAYS.

1. *Action for calls—colorable subscription.*—Declaration against defendant as a shareholder in a Railway Company for calls on stock. Plea, that by the plaintiff's charter it was provided that so soon as \$100,000 stock should be taken, and ten per cent. thereon paid into a chartered bank, the Provisional Directors might call a general meeting, and the shareholders who had paid such ten per cent. should elect directors and organize the company:

that one D. acting in collusion with the Provisional Directors, to enable them to make a colorable compliance with the Act, agreed to and did enter his name as a subscriber for \$30,000 stock, and to pay \$3,000 thereon, and it was agreed that he should not be called on for any further payments on said stock, and that any payment he might colorably make should be restored to him by means of a contract for building a railway for the plaintiffs, which the Provisional Directors then agreed to give him on such terms as would yield a large profit: that the said subscription was not *bonâ fide*, but in fraud of the Act; and before \$100,000 stock had been taken, exclusive of such fraudulent subscription, the Provisional Directors called a meeting, at which D. was present and assumed to rate as a shareholder, and chose directors, who made the alleged calls; wherefore the said company has never been legally organized, and the said calls were not authorized.

Held, no defence; for D. could not dispute his being a shareholder, and the alleged agreement with him being contrary to the statute could not operate.—*The Port Whitby and Port Perry Railway Company v. Jones*, 170.

2. *C. S. C., ch. 66, sec. 83—Injury by fire—Limitation and form of action.*—The declaration alleged that defendants were possessed of a strip of land, being the bank and side of a railway, separating their track from plaintiff's land: that they negligently and contrary to their duty allowed dry wood, leaves, &c., to accumulate there, on which red hot ashes, &c., fell from the engine, and there was in consequence great danger, as they knew, that the leaves, &c., would be ignited, and the fire extend

to the plaintiff's land, unless the leaves, &c., were removed, or care taken to prevent any fire so occasioned from extending; but that they so negligently kept such strip of land that in consequence the leaves, &c., took fire from their engine, and thereby, and by want of due precaution by them to prevent such fire extending, the fire spread to the plaintiff's land and burned his trees, &c.

Held, affirming the judgment of the Queen's Bench, 1. That the count disclosed a good cause of action.

2. That it was for an injury sustained "by reason of the railway" within Consol Stat. C, ch. 66, sec. 83; and that the plaintiff, therefore, suing more than six months after such injury, was barred.

Quære as to the effect of the Imperial Act 14 Go. III. ch. 78, in such a case.—*McCallum v. The Grand Trunk Railway Company of Canada, (In Appeal)*, 527.

3. *Ejectment*.]—The judgment of the Q. B. reported in 30 U. C. R. 147 affirmed;

Holding, that the plaintiff could not, under the facts proved, maintain ejectment against the defendants for land occupied by them for their railway.—*The Corporation of the county of Welland v. The Buffalo and Lake Huron Railway Company, (In Appeal)* 539.

See MASTER AND SERVANT.—STREET RAILWAY.

RECEIPT.

For goods, estoppel by.]—See ESTOPPEL.

RECOGNIZANCE.

See CRIMINAL LAW.

REGISTRY LAWS.

Certificate of discharge of mortgage—*Registration*—31 Vic. ch. 20, O—

Mandamus—Under 31 Vic. ch. 20, O., a registrar cannot be required to register a certificate of discharge of mortgage applying to more than one instrument; each mortgage to be discharged should have a separate certificate.

Quære, as to the effect and validity of a certificate embracing several mortgages, or of its registry.

In this case the certificate related to two mortgages, stating that they were respectively registered in the registry office for the county of Brant on the day and hours named, in liber A of the general register for the county, as numbers 53 and 66, respectively. The registrar registered in it the general register book, but refused to record it in the books for the town and township of Brantford, though the mortgages included land there, on the ground that it only mentioned the number of each mortgage as registered in the general registry book.

Held, that this reason was insufficient.

A rule *nisi* having issued for a mandamus to compel him to register, the objection to including both mortgages in one certificate was first taken on the argument; and the Court, under these circumstances, discharged the rule without costs.—*In re Smith and Shenston, Registrar of the County of Brant* 305.

REGULÆ GENERALES.

See RULES OF COURT.

REPLEVIN.

1. *Verdict as to part*—*Action on replevin bond.*]—Where a plaintiff in replevin succeeds only for part of the goods replevied, and a return is adjudged as to the rest, he is liable

upon the replevin bond for not prosecuting the suit with effect as to the goods for which he failed, and for not returning them.—*Patterson et al. v. Fuller et al.* 323.

2. *Replevin bond—Action for refusal to assign — Damages.*] — Action against the sheriff for not assigning a replevin bond. It appeared that one H. originally owned the goods replevied, which were wrongfully taken from him and sent to Windsor. There they were replevied by H. from the Great Western R. W. Co., who held them for one P., the defendant in the replevin suit. P. assigned the goods to F. H., who sued the R. W. Co. in the State of Michigan, and recovered their value, which the company paid. The company then sued the sheriff for taking the goods, but failed, the verdict being that the goods when replevied belonged to H., not to P. H. did not go on with the replevin suit, and P., for the benefit of the R. W. Co., claimed an assignment of the bond, which the sheriff refused to give.

Held, that only nominal damages could be recovered, for P., not being the owner of the goods, could not recover their value.—*Pacaud v. McEwan*, 328.

ROADS.

See HIGHWAYS.

RULES OF COURT.

Under the Controverted Elections Act of 1871, See page 225.

RULE NISI.

To rescind Judge's order—Form of.]—See INFANTS.

Abandonment of — Costs on.]—See COSTS.

SALE OF GOODS.

1. *Contract by letters and telegrams.*] —The plaintiff, on the 14th June, by telegraph, asked defendants their prices for high-wines and whiskey. On the 16th defendants wrote, specifying the prices for quantities not less than a car-load, and requesting an order, which they said should receive prompt attention. On the 17th, the plaintiff telegraphed, "Send three car-loads high-wines." Defendants answered, that the price had advanced, and refused to deliver at the price first named. It was admitted that the order was reasonable in point of quantity, and that defendants had the goods on hand.

Held, that there was a complete contract, and that defendants were liable for not delivering.—*Harty v. Gooderham et al.* 18

2. *Sale of wheat—Property held not to pass—Conversion into flour—Endorsement of shipping receipt to Bank—Re-indorsement, effect of—Jus tertii.*]—M. & Co., at Guelph, bought a car-load of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own names as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was endorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days' sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants, upon C.'s order, to his brother, who had a mill there. It

was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, was delivered by him to the defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt reindorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co, denied the plaintiff's right to it, and set up the title of M. & Co. The case having been tried without a jury :

Held, that M. & Co., on the reindorsement by the bank to them, were in as of their former title, not as assignees of the bank with the rights given to the latter by the statute, and that their rights must be considered as if the bank had never intervened.

2. That the defendants were entitled to set up the title of M. & Co. as a defence.

3. *Wilson, J.*, dissenting, that as between M. & Co. and C., the insolvent, the property in the wheat did not pass to C. until paid for, it being the reasonable presumption from all the circumstances that this was the intention of the parties.

4. That the conversion of the wheat into flour made no difference, for, looking at the usual course of business in such matters, this flour, though not made from the identical wheat, should be regarded as the produce of it.

The defendants, therefore, were held entitled to succeed.—*Mason, Assignee of F. D. Cummer, v. The Great Western Railway Co.*, 73.

When property passes.] — See BOUGHT AND SOLD NOTES—EXECUTORS—INSOLVENCY—MONEY LENT.

SALE OF LAND.

Sale of share in mines—Agreement to account for half the profits—Construction of.]—The plaintiff, having discovered mines upon certain lands, agreed with D. & T. that they should furnish the funds to work the mines, and, after securing the title, convey an undivided third to him. He afterwards agreed to assign his interest in this agreement to the defendant, in consideration of \$100, and one-half of whatever profit might be derived from the share agreed to be given to him by D. & T.; and the defendant agreed to account for and pay over to him one-half of whatever profits or returns might be derived from the said share assigned to defendant, as agreed to be given to the plaintiff by D. & T.; and further, it was agreed that the plaintiff should not have to pay or advance any moneys or labor in the working of said mines. The defendant having sold one-half of his interest to one G. for \$1,125 :

Held, that this money was not profits or returns derived from defendant's share, for which he was bound to account to the plaintiff under his agreement.—*Loucks v. Wallbridge*, 32.

SCHOOLS.

See COMMON SCHOOLS.

SERVANT.

See MASTER AND SERVANT.

SERVICE OF PAPERS.

Sticking up in C. C. office—Laches—C. C. rule of Court 131—*C. L. P. Act, secs, 52, 53.*]—The defendant

in a County Court suit appeared in person, but gave no address for the service of papers, as required by secs. 52 and 53 of the C. L. P. A. and C. C. Rule of Court No. 131. The declaration was served on him personally, and pleas filed. The person who served the pleas for him refused to receive the issue book, notice of trial, &c., and they were stuck up in the office of the Clerk of the Court. The plaintiff took a verdict on the 20th April, the defendant not appearing, and the defendant was informed of it on the 27th. No steps were taken by him to stay proceedings, and final judgment was entered on the 5th May. Defendant in Easter Term following moved for a new trial.

Held, that the plaintiff's proceeding was warranted by the rule of Court, notwithstanding the declaration had been personally served.

Semble, that if it were irregular, the defendant, on being aware of the verdict, should have moved to stay the plaintiff's proceedings, and that at all events he should have done so if he wished to move upon the merits.

O'Neill v. Everett, 4 P. R. 98, distinguished.—*Covert v. Robertson*, 256.

SESSIONS.

Appeal from Q. S.—Power to give costs—33 Vic. ch. 27, sec. 1.]—Under 32–33 Vic. ch. 31, sec. 65 and 33 Vic. ch. 27, D., the Court of Quarter Sessions has no power to award costs on discharging an appeal for want of proper notice of appeal; for the words "shall hear and determine the matter of appeal" mean decide it upon the merits.—*In re Madden*, 333.

See CRIMINAL LAW, 2,

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SET-OFF.

Semble, per Wilson, J., that a defendant, though the plaintiff be nonsuited or have a verdict against him on the other issues, may have his set-off found and a verdict entered for it, for he has an independent right to judgment for his claim, which the plaintiff cannot defeat by a nonsuit *Parsons v. Crabb*, 434.

See LIMITATIONS, STATUTE OF, 3.

SHIPPING

Carriage not completed—Right to freight.]—The defendants shipped about 5000 bushels of grain on the 4th of December, on the plaintiff's vessel at Port Hope, to be carried to Oswego, at 8 cents a bushel freight. She was driven by stress of weather into Presqu' Isle, where she was frozen in, and the plaintiff had to procure a tug to break the ice and tow her out. When on her way to Oswego a leak was discovered, in consequence of which they changed their course and went to Charlotte, at the mouth of the Genesee river. The captain then telegraphed to V., who had shipped the grain for defendants, and who after communicating with defendants instructed him to discharge the cargo, which was done. About the 1st of April the plaintiff had the vessel ready to take the wheat on, but being a Canadian vessel the American Government refused to let him carry it, after it had been unloaded, from one American port to the other. The defendants did not again ask him to take it on, but sold it at Charlotte in April, the price being less than they would have got for it in December at Oswego, and considerable expense having been incurred by the delay. It was said that after discharging about 1200

bushels the vessel was so lightened that the leak could have been repaired, and she might have gone on; but the jury found that the captain's conduct was justifiable under the circumstances. *Held*, that there was evidence to shew an acceptance by defendants of the grain at Charlotte, and that they dispensed with the further carriage of it; and that the plaintiff was entitled therefore to recover freight *pro ratâ itineris*.

Held, also, that the loss caused by the delay could form no defence to such claim, though it might be the subject of a cross action.—*Wright v. Cluxton and Dundas*, 246.

2. *Delay of vessel—Liability.*—Liability of consignors of goods for delay of vessel, as upon an implied contract to receive the goods within a reasonable time. *Barker v. Torrance et al.*, 30 U. C. R. 43, affirmed in appeal.—*Barker v. Torrance et al.* (In Appeal), 561.

SLANDER.

Justification—Evidence of malice.—In an action of slander for charging the plaintiff with perjury committed as a witness at a trial between defendant and another, the defendant pleaded and tried to prove a justification, but having failed in the attempt abandoned the plea. The jury were told that if defendant believed the charge to be true and acted *bonâ fide*, and did not make it before more persons or in stronger language than was necessary, they might consider the circumstances of the speaking, and entertain them as evidence to rebut the legal inference of malice. *Held*, there being no ground for saying that the communication was privileged, that this was misdirection.

Held, also, that the jury should have been told that they might consider the defendant's conduct in pleading and attempting to prove the justification, as some evidence of malice, and an aggravation of the injury.—*Faucitt v. Booth*, 263.

SLAVERY.

See MARRIAGE.

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF).

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STATUTES.

Repeal of statute, with saving clause—Effect of such clause.—See TAXES.

STATUTES (CONSTRUCTION OF.)

14 Geo. III. ch. 78, (Imperial).]—See RAILWAYS, 2.

Consol. Stat. C. ch. 66.]—See RAILWAYS

Consol. Stat. U. C. ch. 27, sec. 17.]—See EJECTMENT.

Consol. Stat. U. C. ch. 55.]—See TAXES

Consol. Stat. U. C. ch. 74.]—See INFANTS.

Consol. Stat. U. C. ch. 82, sec. 10.]—See HUSBAND AND WIFE, 2.

Consol. Stat. U. C. ch. 126, sec. 3.]—See CONVICTIONS.

27 Vic. ch. 19, sec. 12.]—See TAXES.

27-28 Vic. ch. 17.]—See INSOLVENCY.

29-30 Vic. ch. 51.]—See HIGHWAYS, 2.

—MUNICIPAL CORPORATIONS.

29-30 Vic. ch. 106.]—See STREET RAILWAYS.

31 Vic. ch. 1, sec. 6.]—See ELECTIONS, 2.

31 Vic. ch. 20, O.]—See ELECTIONS.

32 ch. 4, O.]—See REGISTRY LAWS.

32 Vic. ch. 6, O.]—See TRIAL.

32 Vic. ch. 23, secs. 18, 19, O.—See DIVISION COURTS, 1.

32 Vic. ch. 32, O.]—*See* APPEAL, 3.
 32-33 Vic. ch. 11, D.]—*See* PATENT FOR
 INVENTION.
 32-33 Vic. ch. 31, D.]—*See* SESSIONS.
 33 Vic. ch. 20, O.]—*See* PARTNERSHIP
 33 Vic. ch. 27, sec. 1, D.]—*See* SESSIONS.
 Insolvent Acts of 1864 and 1865.]—*See*
 INSOLVENCY.

STOCK.

See RAILWAYS, 1.

STREET RAILWAY.

Obligation to keep rails level with highway—29-30 Vic. ch. 106, secs. 5, 9.]—The defendants' charter compelled them to lay their rails flush with the street, and to make their track conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the street.

Held, reversing the judgment of the County Court, that having so laid the rails, they were not bound to alter and adapt them from time to time to changes in the level of the street; and therefore that they were not liable for an accident arising from the street having become worn down by traffic, so as to leave the rail, which remained as originally laid, several inches above the level.—*Eddy v. The Ottawa City Passenger Railway Company*, 569.

SURRENDER OF LEASE.

See LANDLORD AND TENANT, 1.

TAXES.

Collection of taxes—Extension of time—C. S. U. C. ch. 55, secs. 103, 104, 177—21 Vic. ch. 19—*Neglect to pay over*—*Issue of warrant under sec. 177—Computation of time*—“*Within twenty days after.*”]—One

M. was collector of a township for 1864 and 1865.

By the C. S. U. C., ch. 55, as amended by 27 Vic., ch. 19, sec. 12, the roll was to be returned to the township treasurer by the 14th December in every year, or on such day in the next year, not later than the 1st May, as the County Council might appoint; and in case of his neglect to collect by the day so appointed the County Council might, by resolution, authorize him to continue the collection; but this was not to affect his duty to return the roll, or the liability of his sureties. It was also enacted that on his neglect to pay over or account, the treasurer should, “within twenty days after the time when the payment ought to have been made,” issue a warrant to the sheriff to levy the sum not paid or accounted for, on his goods or lands.

In January, 1865, he was authorized to continue the collection of taxes for the township “so long as he should be recognized by the municipality of said township.” He did not return the rolls until April, 1867, when a large sum of the taxes for each year appeared not to be accounted for. On the 2nd of that month, the treasurer, under a resolution of the council, demanded payment, and on the 6th he issued his warrant, under which the sheriff, in May, sold the land in question.

Held, that the sale was unauthorized, and that the sheriff's deed conveyed no title.

Per Richards, J.—The extraordinary remedy given by the issue of a warrant applies only when the collector neglects to pay over by some time fixed within the period allowed by law; but if the municipality authorize him to continue the collection beyond that period, his liability,

and that of his sureties, must be enforced by the ordinary means.

Per Wilson, J.—The demand on the 2nd of April made that the day on which the payment ought to have been made, but under the Statute the warrant could not be issued until the expiration of twenty days from that time, and was therefore premature.

On the 1st January, 1867, the Acts above mentioned were repealed, "saving any rights, proceedings, or things legally had, acquired, or done under them." *Quere*, whether the right to issue the warrant still existed.—*Charlesworth v. Ward*, 94.

TENANCY IN COMMON.

See HUSBAND AND WIFE.

TRIAL.

Waiver of notice for jury—[The Law Reform Act of 1868, sec. 18, sub-sec. 3, enacts that it shall be competent for the parties at a trial to consent that the notice for a jury shall be waived, and the case tried by the Judge, "and to endorse a memorandum of such consent on the record; and thereupon" the Judge shall try, &c. The plaintiff had given notice for a jury, but at the trial the counsel on both sides waived it, and requested the Judge to try the case, which he did, and found for the plaintiff; but no memorandum was endorsed. On objection by the plaintiff to the Judge's authority to try:

Held, that the record might be amended by the Judge's notes, which stated the waiver and consent, and the endorsement of the memorandum made *nunc pro tunc*.—*Wycott v. Campbell*, 584.

See SET-OFF.

UNLIQUIDATED DAMAGES.

See INSOLVENCY, 3.

VARIANCE.

See BOUGHT AND SOLD NOTES.

WAIVER.

Of time for performance of work.]

—See CONTRACT.

See LIMITATIONS, STATUTE OF, 3.

—TRIAL.

WHEAT.

Sale of, conversion of by vendee into flour; effect of on property passing.].—See SALE OF GOODS, 2.

WILL.

Construction—Agreement to sell land—subsequent devise to vendee.] B. owning the south half of lot two, agreed under seal in 1859 with the defendant, his son, to let him have the east twenty acres in consideration of work done, and to convey it so soon as defendant should get it surveyed. In 1860, he, by his will, devised to his wife, for life, all that part of lot two "now owned by me," and to the defendant, in fee, "twenty acres of the east side of lot two, which I do now own." The remainder of his estate, at his wife's death, he devised to his daughters the plaintiffs, on condition of their supporting their brother E., who was not in his right mind. It appeared that two and a half acres of the lot had been sold by B., but whether conveyed or not was not shewn, and that after the agreement defendant with the others had continued to live upon the lot as one family.

The mother having died, the

daughters claimed the twenty acres west of the easterly twenty acres, while the defendant contended that this passed under the devise to him, not the east twenty acres of which he was already entitled to a conveyance under the agreement.

Held, 1. That parol evidence was inadmissible, that the twenty acres intended to be devised to defendant was the land in dispute.

2. That the plaintiffs were entitled to such land, for the defendant was wrong in his contention, and the devise to him was of the land which the testator had agreed to convey, but had not conveyed, to him.—*O'Day et al. v. Black*, 38.

2. The defendant pleaded on equitable grounds that W., by his will, devised all his lands to the plaintiffs in trust for the sole benefit of J. during her life, under which she

claimed and received from them the rent.

Held, also, that by the devise, as stated in the plea, the legal estate in the land was vested in J. under the Statute of Uses.—*Fair et al. v. McCrow*, 599.

WORK AND LABOUR.

See CONTRACT.

WORDS (CONSTRUCTION OF.)

“*Bailiwick.*”]—See DIVISION COURTS, 1.

“*Reassigned.*”—See PLEADING, 2.

“*By reason of the railway.*”—See RAILWAYS, 2.

“*Hear and determine the matter of appeal.*”]—See SESSIONS.

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